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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 310. 71.

THE UNITED STATES, APPELLANT,

vs.

EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED MAY 22, 1900.
(17424.)

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1898, and held in the court room of said court in the city of New Orleans.

Before the honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, the honorable Charles Swayne, United States district judge for the northern district of Florida, and the honorable Charles Parlange, United States district judge for the eastern district of Louisiana.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
EUGENE BEEBE ET ALS., APPELLEES.

Be it remembered that heretofore, to wit, on the 20th day of September, 1897, a transcript of the record of the above-styled cause from the circuit court of the United States for the middle district of Alabama was filed in the office of the clerk of said United States circuit court of appeals, in the words and figures following, to wit:

1 TRANSCRIPT OF RECORD.

United States circuit court of appeals, fifth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
EUGENE BEEBE ET ALS., APPELLEES. } No. .

Appeal from the circuit court of the United States for the middle district of Alabama.

Filed , 1897. May term, A. D. 1897.

At a circuit court of the United Scates for the middle district of Alabama, in the fifth judicial circuit, begun and held at Montgomery, Alabama, on the first Monday in May, it being the 3rd day of said month, in the year of our Lord one thousand eight hundred and ninety-seven.

Present and presiding: The honorable John Bruce, judge of the
2 district courts of the United States for the middle and northern districts of Alabama, sitting as circuit judge, Saturday, May 29th, 1897, a day of said term, the following proceedings were had:

THE UNITED STATES OF AMERICA } No. 122. In equity. Original bill.
vs.
EUGENE BEEBE ET ALS.

In the circuit court of the United States for the middle district of Alabama, fifth circuit.

To the honorable the justices and the judges of the circuit court of the United States in and for the middle district of Alabama, in the fifth judicial circuit, sitting in equity:

The United States of America, by its Attorney-General, brings this, its bill of complaint, against Eugene Beebe, of Montgomery, Alabama, a resi-

dent citizen of said middle district of Alabama; and against William A. Henshaw and Christiana Henshaw, his wife; Cornelia H. Henshaw, widow of the late Gilbert F. Henshaw, brother of Ferrie Henshaw, hereinafter mentioned, residing in Brooklyn, New York; Samuel W. Henshaw and Mary S. Henshaw, his wife; Sarah R. Buxton; George A. Henshaw and Zuriah E. Henshaw, his wife; Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Dasie B. Henshaw, children of said late Gilbert F. Henshaw and his heirs at law, all of whom are citizens of the State of New York; Catherine I. Ferris, a resident of Montclair, New Jersey, who is a citizen of the State of New Jersey; and against the heirs at law of Gilbert I. Henshaw, a son of said late Gilbert F. Henshaw, who died after the death of his father, minors, whose names
3 are not now known to orator, but prayed to be inserted in their appropriate places in this bill when ascertained, who are citizens of the State of New York; all of said Beebe, being the heirs at law of Ferris Henshaw, deceased, lately residing at Montgomery, State of Alabama, and a citizen of said middle district of Alabama; and against the Montgomery Light Company, the Montgomery Land and Improvement Company, and the Freidman Vinegar and Cider Works, corporations, respectively, created by and existing under the laws of the State of Alabama, and citizens of said middle district of Alabama; and against Abbie F. Rice, wife of W. P. Rice, of Fort Payne, Alabama, and a citizen of the State and northern district of Alabama; and against the Southern Oil Company, a corporation created by and existing under the laws of the State of New Jersey, but residing, doing business, and having an agent duly authorized in said middle district of Alabama; and against the Cleveland Cider Company, firm or partnership composed of Edwin R. Cleveland and Arthur B. Cleveland, citizens of the State of Ohio; all of said defendants, except the heirs of said Gilbert I. Henshaw, being of lawful age; and thereupon orator complains and says:

(1) That on the 2nd day of June, A. D. 1873, said Eugene Beebe and Ferris Henshaw became and were sureties on the official bond of Francis Widmer, collector of internal revenue of the second district of Alabama, in the full and just sum of fifty thousand dollars, money of the United States, which bond was duly approved on the ninth day of June, A. D. 1873, conditioned that the said Francis Widmer, as such collector as aforesaid, should faithfully perform the duties of his said office, according to the provisions of existing law, and of laws thereafter enacted,
4 and should justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which might come into his hands or possession, and that each and every deputy collector appointed by said collector should truly and faithfully execute and discharge all duties of such deputy collector according to law.

(2) That said Widmer, as such collector, did not faithfully perform the duties of his said office according to law, and did not justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys that came into his hands or possession, and each and every deputy collector appointed by him did not faithfully execute and discharge all the duties of such deputy collector according to law; but that he wholly failed and refused to account for and pay over to the United States the

sum of twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents ($28,158.56), public moneys that had come into his hands and possession as such collector, which said sum is still due and unpaid to the United States, together with interest thereon from January 1st, A. D. 1874.

(3) That said Eugene Bebee and said Ferrie Henshaw were, and for many years had been, partners in business, and were joint owners in fee simple of the following described property situated in the county of Montgomery and State Alabama, and in said middle district of Alabam', to-wit:

The lot and storehouse thereon known and described as No. 28 Dexter avenue, formerly No. 28 Market street, sometimes called the "Rialto," in the city of Montgomery, Alabama.

5 All that certain lot of ground commencing at a point on the west side of North Perry street, formerly Perry street, one hundred and twenty-nine feet north from the northwest corner of Dexter avenue, formerly Market street, and North Perry street, formerly Perry street, and running north along said North Perry street eighteen (18) feet, and running back and west one hundred feet, fronting on said North Perry street, making a lot eighteen by one hundred feet (18x100), together with a building thereon, known as Brock's Store, formerly known as "Washington Hall," and also formerly known as "Cashin's," said premises also being known as number eleven (11) North Perry street, being the same premises formerly known as number eleven (11) Perry street, in the city of Montgomery, Alabama.

The lot or parcel of land bounded by a line commencing at a point on South Perry street, thirty-five feet north of the northwest corner of South Perry street and Washington street, and running north on a line with the west side of South Perry street twenty-five feet, thence west one hundred feet, thence south twenty-five feet, and thence east one hundred feet to the point of beginning, being in the block bounded north by Dexter avenue, formerly Market street, south by Washington street, east by South Perry street, formerly Perry street, and west by South Court street, formerly Court street, said lot being also known and described as number twenty-two (22) South Perry street, and being the same premises heretofore known as number sixteen (16) Perry street, in the city of Montgomery, Alabama.

The west half (w½) of lot number eleven (11) on the north side of the street formerly known as Market street, and now known as Dex-

6 ter avenue, between North Perry and North Lawrence streets, together with all the improvements and appurtenances thereon and thereunto belonging, including the privilege of the use of the alley way in the rear thereof, said lot measuring twenty-five (25) feet front on said Dexter avenue, formerly known as Market street, and running back about one hundred and sixty feet, more or less, to the said alley way, said premises being also known as number one hundred and nine (109) Dexter avenue, and being the same premises formerly known as number forty-one (41) Market street, in the city of Montgomery, Alabama.

All that certain tract of land commencing at a point 3,960 feet, more or less, north of the east and west line between sections one and twelve, township sixteen, north, range seventeen, east, and 605.3 feet, more or

less, west of a point in the center of the Western Railway track, where it is crossed by the public road, which is a continuation of Court street, Montgomery, on the road or street leading from the Western Railway track into the "Fair" or "Exposition" grounds, on the land of the Montgomery Land and Improvement Company, and running along and on said road or street, west 1,980 feet, thence turning an angle of 79 deg. 14 min. to the right, or north, 361 feet, thence 17 deg. 4 min. to the right, 963 feet, thence 5 deg. 23 min. to the left, 1,340 feet, to a point near the east and west line between the north and south halves of the southeast quarter of section thirty-six, township seventeen, north, range seventeen, east, thence at a right angle east, 1,330 feet, more or less, thence south 1,318 feet, thence east along the line between said section thirty-six and said section one, 950 feet, thence in a southerly direction, 1,330 feet, more or less, to the place of beginning,
7 being the same premises heretofore known as "The Montgomery Race Track," and which was enclosed by a fence, said lands lying and being situated in the northeast quarter of section one, township sixteen, north, range seventeen, east, and in the southeast quarter of section thirty-six, township seventeen, north, range seventeen, east, all near the city of Montgomery, in the county of Montgomery, and State of Alabama.

That said Ferrie Henshaw died, in Montgomery, Alabama, intestate, April 19th, 1879, leaving as heirs-at-law the aforesaid William Henshaw, Gilbert F. Henshaw, Samuel W. Henshaw, Sarah R. Buxton, George A. Henshaw and Catherine I. Ferris; that said Gilbert F. Henshaw died, leaving as heirs-at-law Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Daise B. Henshaw, and Gilbert I. Henshaw, his children; also leaving a widow, Cornelia H. Henshaw, all of whom are of full age; that said Gilbert I. Henshaw died, after the death of his father, leaving minor heirs whose names are unknown to Orator but will be inserted by leave of this Honorable Court, when ascertained; and that the said Eugene Beebe, and said Ferrie Henshaw, and the estate of said Ferrie Henshaw, are at the date of the filing of this bill, and have been uninterruptedly since and prior to the year 1873, owners of all of said property hereinabove described, which is of the value of fifty thousand dollars.

(4) That on the thirteenth day of June, 1879, following the appropriate action in said court thereof, William T. Hatchett, a citizen of said Middle District of Alabama, was, by the probate court of Montgomery County, Alabama, in which county said Henshaw died, and said property was and is situated, duly appointed administrator of the estate of
8 said Ferrie Henshaw; that on the 17th day of April, A. D. 1880, said Hatchett, as such administrator, represented and reported to said probate court that said estate was insolvent; filed with his said report a full statement of all the personal and real estate which had come to his knowledge; and the claims against said estate, which said claims aggregated fifty-four thousand nine hundred and thirty-two dollars and fifty cents ($54,932.50) including the said indebtedness to the United States on account of said Henshaw's suretyship upon the bond of said Widmer, stated in said report at fifty thousand dollars ($50,000.00), and he prayed that said estate be declared insolvent; that on

the second day of July, A. D. 1880, said estate was, by said probate court of Montgomery County, declared insolvent. A copy of said proceedings in said probate court is hereby attached, as "Exhibit A," and made a part of this bill, with leave to refer thereto as may be necessary; that said administrator was, on the ninth day of December, A. D. 1882, removed, and William Bellinger was, on the same day, in his capacity as sheriff of said county of Montgomery, appointed administrator of said estate, in place of said Hatchett; that said Bellinger, on the 28th day of November, 1883, tendered his resignation as said administrator of said estate, and the same was, on said day, accepted by said probate court; and that, to the date of the filing of this bill, no further or any administration of said estate has been had; that no settlement in said probate court, either partial, annual or final, has been made by any administrator of said estate, and the said estate of said Ferrie Henshaw remains unsettled and undetermined; and that the personal assets were, and are, insufficient to pay the debts of said estate.

9 (5) That said Eugene Beebe, at, before, and since the said second day of July, 1880, has ever been, and has declared himself to be, insolvent and without sufficient property to pay his debts, including his indebtedness to the United States; and that the said Ferris Henshaw was also insolvent and without sufficient property to pay his debts, including his said indebtedness to the United States.

(6) Orator further states, avers, and charges that by reason of the premises and of the insolvency of said Eugene Beebe and said Ferrie Henshaw, and the estate of said Ferrie Henshaw, orator became and was, and is, entitled to priority of payment over any and all other creditors of said Beebe and Henshaw, and of their and each of their property and estate, of the full amount collected, withheld, appropriated, and due, as aforesaid, by the said Widmer, collector, from and to the United States.

(7) Orator further states, avers, and charges that on the 3rd day of June, A. D. 1880, separate suits at law were duly commenced in the circuit court of the United States for the middle district of Alabama against said Eugene Beebe and against William T. Hatchett, administrator of the estate of said Ferrie Henshaw, for the recovery of the sum or sums for which said Widmer, collector as aforesaid, was in default; the said suits were continued from time to time, at the request and instance of the said defendants, until February 6th, 1885, when judgments were severally entered in said court against said Beebe, and against said Hatchett as administrator of said Henshaw, for one hundred dollars and costs; that said Bebee, on the first day of July, 1886,

10 paid into the Treasury of the United States the sum of one hundred and nine dollars and eighty-five cents ($109.85) as the amount of the judgment and costs rendered as aforesaid against him; but the said judgment against said Hatchett as administrator of the estate of said Henshaw remains, to the date of the filing of this bill, wholly unsatisfied, and is due and unpaid to the United States. That said judgments were entered under the following circumstances: That said defendants came into court, and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferrie Henshaw were poor men, and that said Beebe

and the estate of said Ferrie Henshaw were without property out of which the said judgments could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their estates, by execution, but that if the court would allow a jury and verdict to be entered against them for one hundred dollars they, and each of them, would pay said judgments and costs; that no evidence or proof was or had been introduced in said causes, or either of them, and indebtedness of said Beebe and Henshaw to the United States then being twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents ($28,158.56), and interest, or other large sum; and the statements and representations aforesaid only were before the said circuit court at the time of the entry of said judgments; and no hearing or determination upon the law or the facts involved in said cases was ever had in said court; whereupon the court remarked that unless the district attorney of the United States objected, the causes might be disposed of as suggested aforesaid; said district attorney did not object, and said judgments for one hundred dollars and costs were entered in each of

11 said causes. And orator avers and charges that said statements and representations made as aforesaid by and on behalf of, and for, said Beebe and said Ferrie Henshaw, and the estate of said Ferrie Henshaw, were wholly untrue, and were made to deceive said court and United States attorney, and for the purpose and with the intent to defraud the United States. Orator further avers and charges that said court and United States attorney had no authority in law to accept said statements and representations, which were not made under oath nor in the course of any judicial proceeding, and were not, and were not supported nor verified by, evidence or proofs; and that said acts of said court and United States attorney amounted in law and in fact to, and was, and was intended to be, a mere naked compromise of the claim and demand of the United States against said Eugene Beebe and Ferrie Henshaw, and the estate of said Ferrie Henshaw, which said court and the United States attorney had no authority, but were inhibited by law, to make, entertain, and consummate; that said court was without jurisdiction and power to determine said causes in the manner aforesaid; and that said alleged judgments for one hundred dollars and costs are null and void ab initio, and of no effect, and should be vacated and held for naught in this court of equity.

(8) Orator further states, avers, and charges that the appointment of an administrator ad litem of the estate of said Ferrie Henshaw, to represent said estate in this proceeding, is necessary and proper; and that an administrator ad litem is likewise necessary to represent each of the estates of said Gilbert F. Henshaw and said Gilbert I. Henshaw, in this proceeding, each and all of said estates being without acting administrators within the State of Alabama.

12 (9) Orator is informed and believes, and upon such information and belief states, that the Montgomery Light Company, the Montgomery Land and Improvement Company, the Friedman Vinegar and Cider Works, corporations respectively created by and existing under the laws of the State of Alabama, and citizens of said middle district of Alabama, and the Southern Cotton Oil Company, a corpora-

tion created by and existing under the laws of New Jersey, and a citizen of the State of New Jersey, and the Cleveland Cider Company, a firm or partnership composed of Arthur B. Cleveland and Edwin R. Cleveland, and a citizen of the State of Ohio, and Abbie F. Rice, a citizen of the northern district of Alabama, assert some claim against certain of said property, the precise nature and extent of which is unknown to orator; but orator charges that such claims, each and all, are subordinate to orator's right to condemn and subject said property to the satisfaction of the indebtedness by reason of the default of said Widmer as collector, hereinbefore set out and described; and orator further avers and charges that if either of the persons and corporations mentioned in this paragraph of the bill claim under and by virtue of any conveyance from said Beebe, or said Ferrie Henshaw, or the heirs of said Henshaw, that such conveyances were, and are, each and all, without warrant and authority in law, and were, and are, null and void, and should be vacated, set aside, and held for naught. Orator demands a full discovery of the particulars and character of such, and each of such, claims, together with all contracts, deeds, powers, and other writings, of whatsoever nature, upon which such or any claims are based in whole or in part, as if specially interrogated thereto.

13 (10) Orator states, avers, and charges that the facts and circumstances set out herein as the basis of the relief asked for in this bill have only recently come to orator's knowledge, to-wit, on or about March 5th, 1890.

(11) Orator further avers and charges that on March 22d, 1877, said Eugene Beebe conveyed by deed to said Ferrie Henshaw, then his partner in business, all his (Beebe's) interest and estate in the property described in this bill, together with certain other property therein described, the same constituting all the real and personal property then owned and possessed by said Beebe, for the alleged purpose of securing certain pretended liabilities of said Eugene Beebe to said Ferrie Henshaw, and to protect and secure real or pretended creditors of said firm, composed of said Beebe and said Ferrie Henshaw, and to enable said Ferrie Henshaw more easily and readily to pay and settle the debts of said firm, and to protect and secure said Henshaw for all moneys said Beebe might owe said firm or said Ferrie Henshaw, on a settlement between them of the affairs and business of said firm; that said deed contained a provision that if any of said property not required to be sold for the purposes aforesaid should remain in the hands of said Henshaw, then, on such final settlement between them, he should reconvey the same to said Beebe, his heirs or assigns. A copy of said deed is hereto as "Exhibit B," and made part of this bill, with leave to refer thereto as may be necessary. And orator, upon information and belief, avers and charges that said deed from said Beebe to said Ferrie Henshaw was without consideration, and fraudulently made to hinder, delay, and defraud the existing creditors of said Beebe, and void; and further, that

14 all the property described in this bill remained in the hands of said Henshaw; that none of it has been required, to be sold for the purposes recited in said deed; and that a final settlement has been had of all matters of account and difference between said Beebe and said

Ferrie Henshaw, whereby said Ferrie Henshaw became, and his administrator was and is, bound, and should be required, to reconvey said property to said Beebe, free of encumbrance or charge, as of the date of said conveyance to said Ferrie Henshaw, of March 22d, 1877; but should orator be mistaken in this, then he avers and charges that said property so conveyed by said Beebe to said Ferrie Henshaw became and is answerable, in the hands of said Ferrie Henshaw, his administrators and heirs, for said debts so due to the United States by said Eugene Beebe by reason of the default of said Francis Widmer, collector as aforesaid, or for so much thereof as may remain due and unpaid.

In consideration whereof, and forasmuch as orator is remediless according to the strict rules of the common law and can only have relief in a court of equity, the premises considered, orator prays that writs of subpœna may issue out of this honorable court, directed to the defendants who are named in the introductory part of this bill, to the said Eugene Beebe, William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Catherine I. Ferris, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Dasie B. Henshaw, and the heirs at law of Gilbert I. Henshaw, deceased, and to the Montgomery Light Company, the Montgomery Land and Improvement Company, the Friedman Vinegar and Cider Company, and Abbie F. Rice, and to the
15 Southern Cotton Oil Company and the Cleveland Cider Company, and that publication, by advertisement in the Montgomery Daily Advertiser and in the New York Daily Tribune, as to said nonresident defendants for the time and in the manner required by law, be made, commanding and requiring them and each of them to demur, plead to, or answer this bill within the time limited by law and the rules of this honorable court; that the said judgments for one hundred dollars each, in favor of the United States and against said Beebe and said Henshaw's administrator, be set aside, vacated, and held for naught; that the administration of the estate of said Ferrie Henshaw be removed into and settled by this honorable court; that administrators ad litem be appointed for the estate of said Ferrie Henshaw and the estate of said Gilbert F. Henshaw and the estate of said Gilbert I. Henshaw; that an account shall be stated between the parties, and that a suitable and discreet person, learned in the law and familiar with accounts, shall be appointed master in this case, to whom it shall be referred to ascertain and report the amount due to the United States on account of the liability of said Beebe and Henshaw on the bond of said Francis Widmer, collector as aforesaid, and each and both of them, and to ascertain and report upon the claims, liens, or encumbrances, if any, upon any and all of said property, and that on the coming in of said report the said amount found due to the United States may be held to be a first and prior lien and charge on the property described in this bill; that all conveyances and assignments of said property in conflict with the right and title of the United States in the premises shall be set aside and held for naught; that said property shall
16 be sold by said master for the payment of said indebtedness found due to the United States, as aforesaid, free of all encumbrances whatsoever; that the proceeds of said sale or sales shall be brought into

said court and, so far as necessary, be applied to satisfy and discharge said indebtedness, and the remainder, if any shall be, shall be paid over to the persons found by the judgment and decree of this honorable court to be entitled thereto; that a suitable person shall be appointed as receiver to take possession, charge, and control of all said property, to collect and receive the rents therefor, and to safely keep, preserve, protect, and have all said property or the proceeds of the sale thereof to await and abide the result of this litigation and then be delivered or paid over to the parties who shall appear to be entitled thereto by the decree of this honorable court; that pending this litigation proper writs of injunction be issued out of this honorable court to said Eugene Beebe, the Montgomery Light Company, the Montgomery Land and Improvement Company, the Friedman Vinegar and Cider Works, the Southern Cotton Oil Company, the Cleveland Cider Company, and also to the other defendants herein above, their agents, attorneys, employees, and servants, enjoining and restraining them and each of them from trespassing on or interfering with or conveying said property or any of it, and that on a final hearing of this cause said injunction may be made perpetual; that on said final hearing orator may be allowed, to be payable out of the funds realized herein, reasonable counsel fees and the necessary costs and expenses incident to this litigation, to be taxed; and also that orator shall
17 have such other and further relief in the premises as the nature of the case may require and to this honorable court shall seem meet.

THE UNITED STATES OF AMERICA,
by W. H. H. MILLER,
Attorney-General of the United States.

L. E. PARSONS, Jr.,
United States Attorney for said District,
Solicitors for Complainant, of counsel.

NOTE.—Each of the defendants is required to answer each and every paragraph of the bill, but answer under oath is hereby waived.

W. H. H. MILLER,
Attorney-General United States.
L. E. PARSONS,
U. S. Att'y, Solicitors for Complainant.

EXHIBIT A.

Henshaw, Ferrie, deceased. July 2, A. D. 1880.

REPORT OF INSOLVENCY.

THE STATE OF ALABAMA,
Montgomery County Probate Court:

The undersigned, Wm. T. Hatchett, administrator of the estate of Ferrie Henshaw, respectfully represents and reports to your honor that the property of the said estate, according to the best of his knowledge and belief, is insolvent, and the undersigned herewith files the three following statements, to wit: The first, marked "Statement A," which contains a full statement of all the goods and chattels, evidence of debt, and other per-

sonal property, with the estimated value of each and the amount
18 of money belonging to said estate. The second, marked "Statement B," which is a full statement of the real property of the deceased or of any interest therein, the local situation of such property, and the estimated value thereof. The third marked "Statement C," which is a full statement of the claims against the estate which have come to the knowledge of the undersigned, the character and amount of each claim, and the name and residence of each creditor, so far as known.

STATEMENT A.

There is no property, real or personal, that I have any knowledge of, except the partnership property of Beebe and Henshaw, in the hands of Eugene Beebe, of which he claims control, and which is subject to pay partnership debts before there is anything to be turned into the estate of F. Henshaw, and of the probable value or amount of such estate I am unable to get from Mr. Beebe, or to form an estimate.

STATEMENT B.

The above statement applies in every particular to real property coming under this head.

19 STATEMENT C.

Name of creditor.	Residence of each creditor.	Character of claim.	Amount.
H. C. Davidson	Montgomery, Ala	Burial clothes	$34.00
Moses Clay	do	Digging grave	6.00
Est. H. W. Hitchcock	do	Burial expenses	118.00
Dr. J. F. Johnson	do	Attendance last sickness	20.00
Dr. S. D. Seelye	do	do	18.00
Dr. J. B. Gaston	do	do	230.00
Tatum & Wilkinson	do	a-c	4.00
H. B. Metcalf	do	do	2.50
W. H. Benson	do	Note	4,500.00
Government of the United States	Washington, D. C	Security on bond of S. Widner, suit for.	50,000.00
			54,932.50

And he therefore prays that said estate may be declared insolvent.

W. T. HATCHETT.

THE STATE OF ALABAMA,
Montgomery County Probate Court:

Personally appeared before me, C. W. Buckley, judge of probate, Wm. T. Hatchett, who being sworn, says that the facts stated in the foregoing petition and in the several statements therewith filed are correct and true, to the best of his knowledge, information, and belief.

W. T. HATCHETT.

Sworn to and subscribed before me this 17th day of April, A. D. 1880.

C. W. BUCKLEY,
Judge of Probate.

Filed this 17th day of April, A. D. 1880.

C. W. BUCKLEY,
Judge of Probate.

JULY 2nd, 1880.

20 Henshaw, Ferrie, deceased, estate of.

This being the day to which was regularly continued the hearing of the report and statements for the insolvency of said estate, which said reports and statements were filed in this court by W. T. Hatchett, administrator of said estate, on the 17th day of April, 1880, now comes said administrator and moves the court that said estate be declared insolvent in accordance with said report and statements, and the court being satisfied, from due examination and proof, that notice of the filing of said report and of the day originally set to hear and determine upon the same has been given to the creditors of said estate as required by law, and in all respects as directed by the order of this court entered in the premises on said 17th April, 1880, by publication in the Montgomery Advertiser & Mail, a newspaper published in this county, for four successive weeks, by posting notice on the court-house door for same length of time, and by forwarding notices to all the creditors of said estate whose residences were known, notifying them of the filing of said report of insolvency, and the day appointed by the court for the hearing thereof: thereupon the court proceeded to hear and determine as to said report, & now, none of the creditors of said estate contesting the correctness of said report, it is ordered, adjudged, and decreed by this court that the said estate of Ferrie Henshaw, dec'ased, be, and the same is hereby, declared insolvent. It is further ordered that said Hatchett do file his account, vouchers, and evidences for a final settlement of his administration of said *said* estate, & that the 18th day of August next (1880) be

21 appointed as a day for said administrator to appear and make settlement of his accounts, and that notice of this order and decree & of the time appointed for making said settlement of said administration be given to the creditors of said estate by forwarding to them by mail, postage paid, properly addressed, 30 days before said day of hearing in all cases where the residences are known, & by publication for four successive weeks in the Montgomery Advertiser & Mail, a newspaper published in this county, & by posting on the court-house door for the same length of time; and it is further ordered that said creditors be notified to appear on said day & nominate another administrator, if they see proper.

C. W. BUCKLEY,
Judge of Probate Court.

THE STATE OF ALABAMA, *Montgomery County.* *Probate court.*

I, F. C. Randolph, judge of probate court in and for said county and State, hereby certify that the foregoing pages, numbered from 10 to 12, inclusive, contain a full, true, and exact copy of the proceedings declaring the estate of Ferrie Henshaw insolvent, as fully and completely as the same appears of record in said court.

In witness whereof I have hereunto set my hand, and caused the seal of said probate court to be affixed, at Montgomery, this tenth day of March, A. D. 1890.

F. C. RANDOLPH,
Judge of Probate Court, Montgomery County, Ala.

22 EXHIBIT B.

STATE OF ALABAMA, *Montgomery County.*

EUGENE BEEBE
to
FERRIE HENSHAW. } Deed.

Whereas a copartnership has existed for many years in the city of Montgomery and county and State aforesaid between Eugene Beebe and Ferrie Henshaw, under the name and style of E. Beebe & Co.; and whereas the said firm of E. Beebe & Co. is indebted to various persons, and the said Eugene Beebe, on a settlement of the affairs and business of said firm, will be largely indebted to it, and also to Ferrie Henshaw, for moneys advanced and paid out by him in excess of his proportion as said partner for the debts of said firm, the precise amount of which can not be ascertained until the debts of said firm are paid and a settlement is had between said Beebe and said Henshaw of all the matters relating to said partnership; and whereas the said Eugene Beebe and Ferrie Henshaw are the owners, as said partners, under said name of E. Beebe & Co., of the following real estate in the city of Montgomery and county and State aforesaid, to wit:

The west half of lot No. 7, on the south side of Market street, being 25 feet in front on Market street and running back 110 feet, and also 25 feet east and west by 20 feet north and south of the northwest corner of lot No. 7, on the west side of Perry street, the whole known as "The Rialto," and which is mortgaged to Mrs. Mary Glasscock for $4,500.00; also one undivided half of three-story brick store on the north side of Market street, numbered 41, and the lot
23 on which said store is built, Stephen Schuessler being the owner of the other half of said store and lot; also an undivided half of the building and lot on which said building is erected, on the west side of Perry street, occupied by James T. Holtzclaw as a law office, he owning the other of said building and lot; also the west end of the said lot, which is No. 7, on which said office is built, being 20 feet in width north and south, and running back 100 feet, with the privilege of an alley; also those parts of lots No. 7 and 8 fronting 25 feet on Perry street, and occupied by Messrs. Rice, Jones & Wiley, and Watts & Watts, as law offices; also lots No. 8 and 3 in square No. 14, on the north side of Commerce street, fronting 25 feet on Commerce street, beginning 25 feet from the northwest corner of said lot No. 8, thence running northeast 160 feet to an alley, thence southeast along said alley 25 feet, thence southwest 160 feet to Commerce street, and thence along Commerce street to the beginning; also the south 20 feet of the lot on which Washington Hall, on the west side of Perry street, is situated, and fronting 20 feet on Perry street and running back 75 feet, part of Washington Hall being on said 20 feet; also one undivided half interest in a tract of land called "The Old Montgomery Race Track," about 2 miles from said city of Montgomery, and containing 80 acres, the other half being owned by Josiah Morris; also lots Nos. 1, 2, 3, and 4 in square 19 of Scott's plat of the city of Montgomery;

And whereas the said firm of E. Beebe & Co. also own the following personal property, to wit: a steam launch now lying at the wharf
24 in said city of Montgomery, called *Enterprise*, of Montgomery,

and the stock and fixtures, furniture, billiard tables and appurtenances, and stock of liquors, barrels, and glasses on hand in the building in said city called "The Rialto:"

Now, therefore, in consideration of the premises, and to protect and secure the creditors of said firm, and to enable the said Henshaw the more easily and readily to pay and settle the debts of said firm, and to protect and secure the said Ferrie Henshaw for the monies he has advanced and paid out for said firm of E. Beebe & Co. in excess of his proportion thereof, and to protect and secure him for all moneys I may owe said firm or said Henshaw, on a settlement between us of the affairs and business of said firm, I, the said Eugene Beebe, have granted, bargained, sold, and conveyed, and do hereby grant, bargain, sell, and convey all my interest and estate in the above-described real and personal property, as said partner or otherwise, to the said Ferrie Henshaw, in trust, to sell the same at such times and places, and on such terms, on credit or for cash, or for part cash and part credit, and at private or public sale, as the best interests of the said creditors of said firm and of him and myself as he may determine, and *and* to apply the proceeds thereof to the payment of the debts of the said firm, and to the payment of what I may be found indebted to said firm or to Ferrie Henshaw on the settlement between us of the affairs and business of the said firm; and if any excess should remain in his hands from the sale of said property after the payment of said debts of said firm and of what I may owe the said firm or owe him on the said settlement of the business and affairs of said firm, then he shall pay back to me such excess, and if there should remain in his hands any of said property not required to be sold for the purposes aforesaid, then on such final settlement between us he shall convey the same to me, my heirs, or assigns.

In witness whereof I, the said Eugene Beebe, have hereunto set my hand and seal this the 22nd day of March, A. D. 1877.

EUGENE BEEBE. [SEAL.]

Signed, sealed, and delivered in presence of

J. A. ELMORE.
GUS DYER.

STATE OF ALABAMA, *Montgomery County:*

I, Charles W. Buckley, judge of the probate court in and for the county and State aforesaid, hereby certify that Eugene Beebe, whose name is signed to the foregoing conveyance known to me, acknowledged before me on this day that, being informed of the contents of the said conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 23rd day of March, A. D. 1877.

C. J. BUCKLEY,
Judge of Probate Court Montgomery County.

STATE OF ALABAMA, *Montgomery County:*

OFFICE OF THE JUDGE OF PROBATE COURT.

I hereby certify that the within deed was filed in this office for record on the 23rd day of March, 1877, at 3 o'clock p. m., and duly recorded in Book 8 of Deeds, page 566, and examined.

C. W. BUCKLEY,
Judge Probate Court Montgomery County.

26 STATE OF ALABAMA, *Montgomery County:*

I, Frances C. Randolph, judge of the probate court in and for said county and State, hereby certify that the above and foregoing three pages numbered 13, 14, 15 contain a true, full, and perfect copy of an original deed from Eugene Beebe to Ferrie Henshaw, as the same remains of record in my office as such judge.

In testimony whereof, I have hereunto set my hand and caused the seal of said probate court to be affixed, at Montgomery, Alabama, this 10th day of March, A. D. 1890.

F. C. RANDOLPH,
Judge Probate Court Montgomery County, Ala.

Filed March 10th, 1890, at 10.50 o'clock a. m.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

In the circuit court of the United States for the middle district of Alabama. In equity.

Notice of motion before circuit judge for receiver, &c.

THE UNITED STATES OF AMERICA
against
EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL. } No. 122.

To Eugene Beebe, William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Dasie B. Henshaw, the heirs at law of Gilbert I. Henshaw,
27 deceased, Catherine I. Ferris, The Montgomery Land and Improvement Company, The Montgomery Light Company, The Freidman Vinegar and Cider Works, The Southern Cotton Oil Company, The Cleveland Cider Company, Abbie F. Rice.

You will please take notice that on Thursday, March 20, 1890, at ten o'clock in the morning of that day, in the city of New Orleans, Louisiana, before the Honorable Don A. Pardee, United States circuit judge, at his chambers in the U. S. custom-house building, complainant in the above-entitled cause will move for the appointment of a receiver of the property and rent; and will also move that an injunction pendente lite be issued against you and each of you, your agents, employees, and against such other persons as may be made parties hereto, in accordance with the prayer of said bill.

L. E. PARSONS, Jr.,
United States Attorney, Solicitor for the Complainant.

Received in office March 10, 1890.

B. W. WALKER, *U. S. Marshal.*

Marshal's return of notice.

Executed by serving copy of the within notice at Montgomery, Alabama, March 10, 1890, upon William D. Westcott, sheriff of Montgomery County, Alabama, and on Vincent M. Elmore, register in chancery of Montgomery County, Alabama, and upon T. Gardner Foster, secretary Montgomery Light Company, Henry C. Moses, president, and F. M. Billing, secretary Montgomery Land and Improvement Company, upon J. W. Black, agent Southern Cotton Oil Company, and John Durr, jr., president of the Freidman Vinegar and Cider Company, and on Eugene Beebe, H. C. Semple, of the firm of Brickle Sempld & Gunter, attys., & (on Arrington & Graham, by delivering copy to E. A. Graham of said firm March 11th, 1890).

28

Mch. 10, '90.

B. W. WALKER, *U. S. Marshal.*
By L. D. COX, *Deputy.*

Returned and filed March 11, 1890.

J. W. DIMMICK, *Clerk.*

Summons.

UNITED STATES OF AMERICA, *Middle District of Alabama:*

THE UNITED STATES OF AMERICA, COMPLAINANT,
and
EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL., The Montgomery Light Company, The Montgomery Land & Improvement Company, The Southern Cotton Oil Company, The Freidman Vinegar and Cider Works, et al., defendants.

In equity. No. 122.

The President of the United States of America to William A. Henshaw, Christiana Henshaw, Cornelia H. Henshsw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Dasie B. Henshaw, and the heirs of Gilbert I. Henshaw, who are citizens of the State of New York, and *and* Catherine I. Ferris, who is a citizen of the State of New Jersey, greeting:

29

You are hereby commanded and strictly enjoined, that laying all other matters aside, and notwithstanding any other excuse, you and each of you personally be and appear before the judge of the circuit court of the United States for the middle district of Alabama, at the clerk's office of the said court in the city of Montgomery, at rules to be had on the first Monday in May next, to answer a bill of complaint exhibited against you in the said court by The United States of America and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars. And have there then this writ.

To the marshal of the United States for the middle district of Alabama, to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, on the 11th day of March, in the year of our

Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

J. W. DIMMICK,
Clerk U. S. Circuit Court for the Middle District of Alabama.

W. H. H. MILLER,
Atty. Gen. U. S.,
L. E. PARSONS, Jr.,
U. S. Atty.,
Complainant's Solicitors.

NOTE.—The defendants are required and hereby notified to enter appearance in the above-entitled cause in the clerk's office of said court, on or before the rule day next ensuing, to wit: The fifth day of
30 May, 1890, or the bill may be taken pro confesso against them.

J. W. DIMMICK, *Clerk.*
W. H. H. MILLER,
Atty. Gen. U. S.,
L. E. PARSONS, Jr.,
U. S. Atty.,
Complainant's Solicitors.

Received in office this 11th day of March, 1890.

B. W. WALKER, *U. S. Marshal.*

The within defendants are not inhabitants of and are not to be found in the middle district of Alabama, on the 11th day of March, 1890.
Dated March 11, 1890.

B. W. WALKER, *U. S. Marshal.*

Returned and filed March 11, 1890.

J. W. DIMMICK, *Clerk.*

Summons.

UNITED STATES OF AMERICA, *Middle District of Alabama:*

THE UNITED STATES OF AMERICA, COMPLAINANT,
and
EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL.,
The Montgomery Light Company, The Montgomery Land & Improvement Company, The Southern Cotton Oil Company, The Freidman Vinegar and Cider Works, et al., defendants.
} In Equity.

The President of the United States of America, to Eugene Beebe, The Montgomery Light Company, The Montgomery Land and Im-
31 provement Company, The Freidman Vinegar and Cider Works, who are citizens of the State of Alabama, greeting:

You are hereby commanded and strictly enjoined, that laying all other matters aside, and notwithstanding any other excuse, you and each of you personally be and appear before the judge of the circuit court of the United States for the middle district of Alabama, in the clerk's office of

the said court in the city of Montgomery, at rules to be had on the first Monday in April next, to answer a bill of complaint exhibited against you in the said court by the United States of America and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars. And have there then this writ.

To the marshal of the United States for the middle district of Alabama, to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, on the 10th day of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

J. W. DIMMICK,
Clerk U. S. Circuit Court for the Middle District of Alabama.
W. H. H. MILLER,
Atty. Gen. U. S.,
L. E. PARSONS, Jr.,
U. S. Atty.,
Complainant's Solicitor.

NOTE.—The defendants are required and hereby notified to enter
32 appearance in the above-entitled cause, in the clerk's office of said court, on or before the rule day next ensuing, to wit: The seventh day of April, 1890, or the bill may be taken pro confesso against them.

W. H. H. MILLER,
Atty. Gen. U. S.
J. W. DIMMICK, *Clerk.*
L. E. PARSONS, Jr.,
U. S. Atty.,
Complainant's Solicitor.

Received in office this 10th day of March, 1890.
B. W. WALKER, *U. S. Marshal.*

The within summons served on the defendant', Eugene Beebe, T. G. Foster, secretary Montgomery Light Company; H. C. Moses, president Montgomery Land and Improvement Company; John Durr, jr., president Freidman Vinegar and Cider Company, at Montgomery, on the 10th day of March, 1890, by delivering to and leaving with him a copy thereof, and at the same time showing him the original with the seal of the court attached.

W. W. WALKER, *U. S. Marshal,*
By L. D. COX, *Deputy Marshal.*

Returned and filed March 11, 1890.
J. W. DIMMICK, *Clerk.*

33 *Summons.*

UNITED STATES OF AMERICA, *Middle District of Alabama.*

THE UNITED STATES OF AMERICA, COMPLAINANT,
and
EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL., The Montgomery Light Company, The Montgomery Land and Improvement Company, The Southern Cotton Oil Company, The Freidman Vinegar and Cider Works, et al., defendants. } In equity.

The President of the United States of America to the Southern Cotton Oil Company, who is a citizen of the State of New Jersey, greeting:

You are hereby commanded and strictly enjoined, that, laying all matters aside, and notwithstanding any other excuse, you personally be and appear before the judge of the circuit court of the United States for the middle district of Alabama, at the clerk's office of the said court in the city of Montgomery, at rules to be had on the first Monday in April next, to answer a bill of complaint exhibited against you in said court by The United States of America, and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit under the penalty on you of two hundred and fifty dollars. And have there then this writ.

To the marshal of the United States for the middle district of Alabama, to execute.

34 Witness, The Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States on the 10th day of March in the year of our Lord one thousand eight hundred and ninety, and of the independence of the United States of America the one hundred and fourteenth.

J. W. DIMMICK,
Clerk U. S. Circuit Court for the Mid. Dist. of Ala.
W. H. H. MILLER,
Atty. Gen. U. S.
L. E. PARSONS, Jr.,
U. S. Atty.,
Complainant's Solicitor.

NOTE.—The defendant is required and hereby notified to enter appearance in the above entitled cause, in the clerk's office of said court, *or* on or before the rule day next ensuing, to wit: The seventh day of April, 1890, or the bill may be taken pro confesso against them.

J. W. DIMMICK, *Clerk,*
W. H. H. MILLER,
Atty. Gen. U. S.
L. E. PARSONS, Jr.,
U. S. Atty.,
Complainant's Solicitor.

Received in this office this 10th day of March, 1890.

B. W. WALKER,
U. S. Marshal.

The within summons served on the defendant J. W. Black, agent, representative of Southern Cotton Oil Company, March 10, 1890, at Montgomery on the 10th day March, 1890, by delivering to and leaving with him a copy thereof, and at the same time showing
35 him the original, with the seal of the court attached.

B. W. WALKER,
U. S. Marshal,

By L. D. COX,
Deputy Marshal.

Returned and filed March 12, 1890.

J. W. DIMMICK, *Clerk.*

Summons.

UNITED STATES OF AMERICA, *Middle District of Alabama.*

THE UNITED STATES OF AMERICA, COMPLAINANT,
and
EUGENE BEEBE, WM. A. HENSHAW, ET AL., THE Montgomery Light Company, The Montgomery Land and Improvement Company, The Southern Cotton Oil Co., Abbie F. Rice, The Freidman Vinegar and Cider Works, et al., defendant.

The President of the United States of America to Abbie F. Rice, wife of W. P. Rice, of Fort Payne, Alabama, who is a citizen of the State of Alabama, greeting:

You are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear before the judge of the circuit court of the United States for the middle district of Alabama, at the clerk's office of the said court in the city of Montgomery, at rules to be had on the first Monday in
36 April next, to answer a bill of complaint exhibited against you in the said court by The United States of America, and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit under the penalty on you of two hundred and fifty dollars. And have there then this writ.

To the marshal of the United States for the middle district of Alabama, to execute.

Witness, The Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, on the 10th day of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

J. W. DIMMICK,
Clerk U. S. Circuit Court for the Mid. Dist. of Ala.

W. H. H. MILLER,
Atty. Gen. U. S.

L. E. PARSONS, Jr.,
U. S. Atty.,
Complainant's Solicitor.

NOTE.—The defendant is required and hereby notified to enter appearance in the above entitled cause, in the clerk's office of said court, on or

before the rule day next ensuing, to wit, the seventh day of April, 1890, or the bill may be taken pro confesso against them.

J. W. DIMMICK, *Clerk.*

37 W. H. H. MILLER,
Atty. Gen. U. S.
L. E. PARSONS, Jr.,
U. S. Atty., Complainant's Solicitor.

Received in office this 10th day of March, 1890.
B. W. WALKER,
U. S. Marshal.

Returned unexecuted, parties absent on a trip North, March 29, 1890.
B. W. WALKER,
U. S. Marshal.

Returned and filed April 4, 1890.
J. W. DIMMICK, *Clerk.*

Motion for personal service on absent defendants, and publication.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, The Montgomery Light Company, The Montgomery Land and Improvement Company, The Freidman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice, et al. } No. 122.

38 Comes the complainant, the United States of America, and represents that the defendants, William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Dasie B. Henshaw, Catherine I. Eerris, the heirs at law of Gilbert I. Henshaw, deceased, Edwin R. Cleveland and Arthur B. Cleveland, a partnership doing business under the firm name of Cleveland Cider Company, The Southern Cotton Oil Company, and Abbie F. Rice, are not inhabitants of and are not to be found in the middle district of Alabama, and have not voluntarily appeared to said cause; wherefore, motion is made for an order requiring said defendants, and each of them, to appear, plead, answer, or demur to said bill by Monday, the fifth day of May, A. D. 1890, and to do further and receive what the said court shall consider in that behalf; and that service of said order shall be made personally upon each of said defendants; and in the event that personal service shall not be practicable, as may appear by the return of the marshal upon said order, that publication against said absent defendants, and

each of them, shall be made, under the direction of the clerk of this court, as required by law, and the prayer of said bill.

March 27th, 1890.

THE UNITED STATES OF AMERICA,
bt L. E. PARSONS, Jr., *U. S. Atty.*

39 GEO. H. PATRICK,
Special Assistant U. S. Attorney,
Solicitors for Complainant.

Filed and entered March 27, 1890.

J. W. DIMMICK, *Clerk.*

Order for personal service and publication.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, The Montgomery Light Company, The Montgomery Land and Improvement Company, The Freidman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice, et al. } No. 122.

It appearing to the court that the bill in this case is to enforce a lien upon and a claim to certain real property within the district, and that certain of the defendants are not inhabitants of nor to be found within the district, and have not voluntarily appeared to answer said bill:

It is ordered that William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, defendants to said bill, who reside in the city of Brooklyn, in the State of New York; and Samuel W. Henshaw, Mary S.
40 Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, and Dasie B. Henshaw, defendants to said bill, who reside in the city and State of New York; and Catherine I. Ferris, defendant to said bill, who resides in Montclair, in the State of New Jersey; and Edwin R. Cleveland and Authur B. Cleveland, partners, doing business under the name of Cleveland Cider Company, defendants to said bill, who reside in the State of Ohio; and the Southern Cotton Oil Company, defendants to said bill, who reside in the State of New Jersey; and Abbie F. Rice, defendant to said bill, who resides in Fort Payne, in the northern district of Alabama; and the heirs at law of Gilbert I. Henshaw, deceased, who resides in the State of New York, do appear, plead, answer, or demur to said bill by Monday, the fifth day of May, 1890.

That this order shall be served on such absent defendants by the marshal of the district of the United States where they respectively reside; and also upon the person in possession or charge of the property described in said bill.

And it is further ordered that, in addition to said service as herein provided for, this order shall be published, under the direction of the

clerk of this court, once a week for six consecutive weeks, in the Montgomery Daily Advertiser, a newspaper printed and published in Montgomery, Alabama, and in the New York Tribune, a newspaper
41 printed and published in the city, county, and State of New York.

At chambers, April 5th, 1890.

DON A. PARDEE,
Circuit Judge.

Filed April 7, 1890.

J. W. DIMMICK, *Clerk.*

Order for personal service and marshal's return.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, THE Montgomery Light Company, The Montgomery Land and Improvement Company, The Freidman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice et al. } No. 122.

It appearing to the court that the bill in this case is to enforce a lien upon, and a claim to, certain real property within the district; and that certain of the defendants are not inhabitants of, nor to be found within, the district, and have not voluntarily appeared to answer said bill:

It is ordered, that William A. Henshaw, Christainna Henshaw,
42 Cornelia H. Henshaw, defendants to said bill, who reside in the city of Brooklyn, in the State of New York; and Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, and Daisie B. Henshaw, defendants to said bill, who reside in the city and State of New York; and Catherine I. Ferris, defendant to said bill, who resides in Montclair, in the State of New Jersey; and Edwin R. Cleveland and Arthur B. Cleveland, partners, doing business under the name of Cleveland Cider Company, defendants to said bill, who reside in the State of Ohio; and the Southern Cotton Oil Company, defendants to said bill, who reside in the State of New Jersey; and Abbie F. Rice, defendant to said bill, who resides at Fort Payne, in the northern district of Alabama; and the heirs at law of Gilbert I. Henshaw, deceased, who reside in the State of New York, do appear, plead, answer, or demur to said bill by Monday, the fifth day of May, 1890.

That this order shall be served on such absent defendants by the marshal of the district of the United States where they respectively reside; and also upon the person or persons in possession or charge of the property described in said bill.

And it is further ordered, that in addition to said service as herein provided for, this order shall be published, under the direction of the clerk of this court, once a week for six consecutive weeks, in the Montgomery Daily Advertiser, a newspaper printed and published in Montgomery,

Alabama, and in the New York Tribune, a newspaper printed
43 and published in the city, county, and State of New York.
At Chambers, April 5th, 1890.

DON A. PARDEE,
Circuit Judge.

Filed April 7th, 1890.

J. W. DIMMEICK, *Clerk.*

Middle district of Alabama, April 7th, 1890.
A true copy of the original order on file.
Attest: J. W. DIMMICK, *Clerk of said Court.*
Received in office April 12, 1890.
U. S. marshal eastern district of New York.
Executed by serving duly certified copies of the within order on Mrs. Cornelia H. Henshaw, wife of the late Gilbert I. Henshaw; Kate G. Henshaw, Annie M. Henshaw, and Daisy B. Henshaw, daughters of Mrs. Cornelia Henshaw, at No. 370 Jefferson ave., in the city of Brooklyn, on April 15, 1890. Gilbert I. Henshaw has been dead six years, Irving Henshaw has been dead five year', and Mrs. Christiana Henshaw, wife of William A. Henshaw, has been dead one year. Florian E. Henshaw died in March. Gilbert I. Henshaw left no heir.

DANIEL LAKE,
U. S. Marshal.

Returned and filed April 23rd, 1890.

J. W. DIMMICK, *Clerk.*

Service and marshal's return.

44 In the circuit court of the United States for the district of Alabama. In equity.

THE UNITED STATES OF AMERICA
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, THE Montgomery Light Company, The Montgomery Land and Improvement Co., The Freidman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice et al. } No. 122.

It appearing to the court that the bill in this case is to enforce a lien upon, and claim to, certain real property within the district; and that certain of the defendants are not inhabitants of, nor to be found within, the district, and have not voluntarily appeared to answer said bill:

It is ordered, that William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, defendants to said bill, who reside in the city of Brooklyn, in the State of New York; and Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, and Daisie B. Henshaw, defendants to said bill, who reside in the city and State of New York, and Catherine I. Ferris, defendant to said bill, who resides in Montclair, in the State of New Jersey, and Edwin R. Cleveland and Arthur B. Cleveland, partners, doing business under the name of Cleveland Cider Company, defendants to said bill, who reside in the State of Ohio; and the Southern Cotton Oil Com-
45 pany, defendants to said bill, who reside in the State of New Jer-

sey; and Abbie F. Rice, defendant to said bill, who resides at Fort Payne, in the northern district of Alabama; and the heirs at law of Gilbert I. Henshaw, deceased, who reside in the State of New York, do appear, plead, answer, or demur to said bill by Monday, the fifth day of May, 1890.

That this order shall be served on such absent defendants by the marshal of the district of the United States where they respectively reside, and also upon the person or persons in possession or charge of the property described in said bill;

And it is further ordered, that in addition to said service, as herein provided for, this order shall be published, under the direction of the clerk of this court, once a week for six consecutive weeks in the Montgomery Daily Advertiser, a newspaper printed and published in Montgomery, Alabama, and in the New York Tribune, a newspaper printed and published in the city, county, and State of New York.

At Chambers, April 5th, 1890.

DON A. PARDEE,
Circuit Judge.

Filed April 7th, 1890.

J. W. DIMMICK, *Clerk.*

Middle district of Alabama, April 7th, 1890.
A true copy of the original order on file.
Attest:

J. W. DIMMICK,
Clerk of said Court.

Received in office April 12, 1890.
U. S. marshal, district of New Jersey.

46 Executed by serving a duly certified copy of the within order on the defendant, Mrs. Catherine I. Ferris, at Montclair, N. J., by handing to and leaving with her said copy, and at the same time exhibiting to her this original with the seal of court attached and reading to her on this 15th day of April, 1890.

W. BUDD DEACON,
U. S. Marshal.
By PATRICK MCHUGH,
Deputy U. S. Marshal.

Returned and filed April 23d, 1890.

J. W. DIMMICK, *Clerk.*

Order for personal service and marshal's return.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA,
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, THE Montgomery Light Company, The Montgomery Land and Improvement Co., The Friedman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice, et al. } No. 122.

It appearing to the court that the bill in this case is to enforce a lien upon and a claim to certain real property within the district, and that cer-

47 tain of the defendants are not inhabitants of nor to be found within the district and have not voluntarily appeared to answer said bill, it is ordered that William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, defendants to said bill, who reside in the city of Brooklyn, in the State of New York; and Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, and Daisie B. Henshaw, defendants to said bill, who reside in the city and State of New York; and Catherine I. Ferris, defendant to said bill, who reside' in Montclair in the State of New Jersey; and Edwin R. Cleveland and Arthur B. Cleveland, partners doing business under the name of Cleveland Cider Company, defendants to said bill, who reside in the State of Ohio; and the Southern Cotton Oil Company, defendants to said bill, who reside in the State of New Jersey; and Abbie F. Rice, defendant to said bill, who resides at Fort Payne, in the northern district of Alabama; and the heirs at law of Gilbert I. Henshaw, deceased, who reside in the State of New York, do appear, plead, answer, or demur to said bill by Monday, the fifth day of May, 1890.

That this order shall be served on such absent defendants by the marshal of the district of the United States where they respectively reside; and also upon the person or persons in possession or charge of the property described in said bill.

And it is further ordered that, in addition to said service as herein provided for, this order shall be published, under the direction of the clerk of this court, once a week for six consecutive weeks, in the

48 Montgomery Daily Advertiser, a newspaper printed and published in Montgomery, Alabama, and in the New York Tribune, a newspaper printed and published in the city, county, and State of New York.

At Chambers, April 5th, 1890.

DON A. PARDEE,
Circuit Judge.

Filed April 7th, 1890.

J. W. DIMMICK, *Clerk.*

Middle district of Alabama, April 7th, 1890.
A true copy of the original order on file.
Attest:

J. W. DIMMICK,
Clerk of said Court.

Received in office April 7th, 1890.

B. W. WALKER,
U. S. Marshal.

Executed by serving duly certified copies of within order on H. C. Moses, W. L. Brock, Thomas H. Watts, sr., T. F. Harrison, J. A. Weiss, Tom Davis, of Davis Bros., Sim Phillips, James O'Brien, April 10, 1890; Eugene Beebe, April 11, 1890; J. S. Pinckard, April 14, 1890; T. G. Foster, April 16, 1890; J. W. Black, April 23, 1890.

B. W. WALKER,
U. S. Marshal.

By L. D. COX,
Deputy.

Returned and filed April 23, 1890.

J. W. DIMMICK, *Clerk.*

49 *Order for personal service and marshal's return.*

In the circuit court of the United States for the middle district of Alabama.
In equity.

THE UNITED STATES OF AMERICA
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, The Montgomery Light Company, The Montgomery Land and Improvement Co., The Freidman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice, et al.
No. 122.

It appearing to the court that the bill in this case is to enforce a lien upon and a claim to certain real property within the district, and that certain of the defendants are not inhabitants of nor to be found within the district and have not voluntarily appeared to answer said bill, it is ordered that William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, defendants to said bill, who reside in the city of Brooklyn, in the State of New York; and Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, and Daisie B. Aenshaw, defendants to said bill, who
50 reside in the city and State of New York; and Catherine I. Ferris, defendant to said bill, who resides in Montclair, in the State of New Jersey; and Edwin R. Cleveland and Arthur B. Cleveland, partners doing business under the name of Cleveland Cider Company, defendants to said bill, who reside in the State of Ohio; and the Southern Cotton Oil Company, defendants to said bill, who reside in the State of New Jersey; and Abbie F. Rice, defendant to said bill, who resides at Fort Payne, in the northern district of Alabama; and the heirs at law of Gilbert I. Henshaw, deceased, who reside in the State of New York, do appear, plead, answer, or demur to said bill by Monday, the fifth day of May, 1890.

That this order shall be served on such absent defendants by the marshal of the district of the United States where they respectively reside, and also upon the person or persons in possession or charge of the property described in said bill.

And it is further ordered that in addition to said service as herein provided for, this order shall be published, under the direction of the clerk of this court, once a week for six consecutive weeks in the Montgomery Daily Advertiser, a newspaper printed and published in Montgomery, Alabama, and in the New York Tribune, a newspaper printed and published in the city, county, and State of New York.

At chambers, April 5th, 1890.

DON A. PARDEE,
Circuit Judge.

Filed April 7th, 1890.

J. W. DIMMICK, *Clerk.*

51 Middle District of Alabama, April 7th, 1890.
A true copy of the original order on file.
Attest: J. W. DIMMICK, *Clerk of said Court.*

Received in office April 12, 1890.
U. S. Marshal Southern District of N. Y.

Executed by serving duly certified copy of the within order on Samuel W. Henshaw and Mary S. Henshaw, his wife, on Sarah R. Buxton, and on George A. Henshaw and Zuriah E. Henshaw, his wife, on April 12, 1890, and on William A. Henshaw on April 14, 1890, and all at the city of New York, in my district. The other within-named defendants could not be found in my district.

JOHN W. JABOBUS,
U. S. Marshal.

Returned and filed April 23, 1890. J. W. DIMMICK, *Clerk.*

Order for personal service and marshal's return.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, The Montgomery Light Company, The Montgomery Land and Improvement Co., 52 The Friedman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice, et al. } No. 122.

It appearing to the court that the bill in this case is to enforce a lien upon and a claim to certain real property within the district, and that certain of the defendants are not inhabitants of nor to be found within the district and have not voluntarily appeared to answer said bill, it is ordered that William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, defendants to said bill, who reside in the city of Brooklyn, in the State of New York; and Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, and Daisie B. Henshaw, defendants to said bill, who reside in the city and State of New York; and Catherine I. Ferris, defendant to said bill, who resides in Montclair, in the State of New Jersey; and Edwin R. Cleveland and Arthur B. Cleveland, partners doing business under the name of Cleveland Cider Company, defendants to said bill, who reside in the State of Ohio; and the Southern Cotton Oil Company, defendants to said bill, who reside in the State of New Jersey; and Abbie F. Rice, defendant to said bill, who resides at Fort Payne, in the northern district of Alabama; and the heirs at law of Gilbert I. Henshaw, deceased, who reside in the State of New York, do appear, plead, answer, or demur to said bill by Monday, the fifth day of May, 1890.

53 That this order shall be served on such absent defendants by the marshal of the district of the United States where they respectively reside; and also upon the person or persons in possession or charge of the property described in said bill.

And it is also further ordered, that in addition to said service as herein provided for, this order shall be published, under the direction of the clerk of this court, once a week for six consecutive weeks, in the Montgomery Daily Advertiser, a newspaper printed and published in Montgomery, Alabama, and in the New York Tribune, a newspaper printed and published in the city, county, and State of New York.

At Chambers, April 5th, 1890.

DON A. PARDEE,
Circuit Judge.

Filed April 7th, 1890.

J. W. DIMMICK, *Clerk.*

Middle district of Alabama, April 7th, 1890.
A true copy of the original order on file.
Attest:

J. W. DIMMICK,
Clerk of said Court.

Received in office April 11, 1890.

B. F WADE,
U. S. Marshal, Northern District of Ohio.

54 The within named Edwin R. Cleveland or Arthur B. Cleveland not found within my district, neither have they or either of them a residence therein.

B. F. WADE,
U. S. Marshal.
By GEO. WYMAN,
Deputy U. S. Marshal.

Returned and filed Nov. 7th, 1890.

J. W. DIMMICK, *Clerk.*

Amendment to bill of complaint.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA, COMPLAINANT,
against
WILLIAM A. HENSHAW ET ALS., EUGENE BEEBE, The Montgomery Light Company, The Montgomery Land and Improvement Company, The Friedman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice et als., defendants.
No. 122.

55 The complainant, by leave of the court first had and obtained, amends the bill of complaint herein by adding as paragraph 2½ of said bill the following:

(2½) That on the 29th day of January, 1872, said Eugene Beebe became and was surety on the official bond of Charles W. Dustan, deputy postmaster at Demopolis, Alabama, in the full sum of twelve thousand

dollars, money of the United States, conditioned that said Charles W. Dustan, as deputy postmaster as aforesaid, should well and truly execute the duties of said office according to law and the instructions of the Postmaster-General, and faithfully render accounts of his receipts and expenditures as deputy postmaster to the Post-Office Department in the manner and form prescribed by the Postmaster-General, and pay the balance of all moneys that should come into his hands from postage collected, postage stamps and stamped envelopes sold, or money orders issued by him, or from any other source connected with the postal service, in the manner prescribed by the Postmaster-General of the United States; that of the money that came into his hands as such officer from postage collected, postage stamps and stamped envelopes sold, and money orders issued by him, and from other sources connected with the postal service, the said Dustan failed and refused to pay to the United States, in the manner prescribed by the Postmaster-General, or in any manner, on January 30th, 1873, the sum of four hundred and forty-one dollars and forty-nine cents; that afterwards, to wit, on the day of , 1874, suit by summons and complaint was duly commenced in the district court of the United States for the middle district of Alabama by the United States against the said Eugene Beebe, and service of the

56 same was duly made October 13th, 1874, upon said Beebe by the marshal of said district; that such proceedings were afterwards had in said suit that on December 26th, 1878, judgment against said Beebe was duly entered in said court for said sum of four hundred and forty-one dollars and forty-nine cents principal and one hundred and thirty-seven dollars and ninety-six cents interest, amounting to five hundred and seventy-nine dollars and forty-five cents, together with the costs of said suit, which amounted to the further sum of fifty-three dollars and eighty-two cents; that motion for new trial was made by said defendant, which motion was, on December 9th, 1879, overruled by said court; that on July 28th, 1880, a writ of fieri facias, commonly called an execution upon said judgment, was duly issued, and on same day placed in the hands of the marshal of said district, which said execution was, on November 1st, 1880, duly returned by said marshal endorsed, "No property found;" that said several sums aforesaid are still due and unpaid to the United States, together with interest thereon.

Complainant amends the 7th paragraph of said bill of complaint by striking out the words "in open court," on the 18th line of said paragraph, and by adding at the end of said paragraph the following: That in the entry of said judgment against said Hatchett, as administrator, under date of February 6th, 1885, it is made to appear that a jury of twelve good and lawful men, to wit, G. L. Werth and eleven others, duly found said verdict for the plaintiff in said sum of one hundred dollars as aforesaid, upon which verdict judgment was so accordingly entered; that in the entry of said judgment against said Beebe, under date February 7th, 1885, it is made to appear that a jury of twelve good and lawful men, to wit, G. L. Werth and eleven others, duly

57 found said verdict for the plaintiff, in said sum of one hundred dollars as aforesaid, upon which verdict judgment was so accordingly entered, which verdict appears in the minutes of said court as "dated February 6th, 1885;" and orator states, avers, and charges, that in truth and in fact, no such verdict or verdicts were found in said court

by said G. L. Werth and eleven other men, as a jury, nor by any other jury or jurors; that no question was submitted to said or any jurors in said cause, or causes; that no judgment was entered based upon such or any verdict by a jury in said cause or causes; that said G. L. Werth was not a juror serving as such in said court, on either the 6th or 7th of February, 1885; that said G. L. Werth had been a juror at said term, but that he and all other jurors in attendance at said adjourned February term of said court, had been duly discharged some days prior to the said 6th day of February, 1885, to wit: On the 4th day of February, 1885, but that prior to their discharge, said jurors had not been empanelled, nor had they rendered any verdict in said cause or causes, nor had said cause or causes been heard or decided in said court, prior to the discharge of said jurors. Orator has discovered the facts hereinabove mentioned, since the filing of the bill, from an examination of the records of said court, to wit: Pages 163 to 184 of the minutes of said adjourned February term, 1885, and of some of the persons who served as jurors at said court, and of the original papers in said causes, which do not show the verdict of any jury; and orator expects to establish the same by said records and papers, and by the evidence of William D. Westcott, P. B. Williams, Philip Priess, G. L. Werth, John F. Jones, and others of said jurors; and of William H. Smith, esq., who was attorney of the United States for said district, in
58 February, 1885, from whose statements, since he ceased to be such United States attorney, orator at the date hereinbefore in this bill mentioned, discovered the other facts set out and referred to in said seventh paragraph, and by whose evidence, and that of other persons at present to orator unknown, said statements are expected to be established.

Complainant further amends said bill of complaint by striking out the names, as parties defendant, wherever they appear in said bill, of Gilbert I. Henshaw and Florien E. Henshaw, who have died intestate and unmarried; of Christiana Henshaw, wife of William A. Henshaw, who is dead; and of Thomas E. Henshaw.

Complainant further amends said bill of complaint by adding to the ninth paragraph of said bill, following the words "Arthur B. Cleveland, and a citizen of the State of Ohio," the words "William H. Buxton, a citizen of the State of New York," and by making said Buxton a party defendant to said bill of complaint.

Complainant further amends the 11th paragraph of said bill of complaint by adding at the end thereof, the following: "And orator states, avers, and charges, that said Henshaw, as such assignee, and the said heirs of said Henshaw, have paid indebtedness due by said Beebe, before having satisfied and paid the debt aforesaid due to the United States, to wit: Amongst others a debt due by said Beebe to Mrs. Sarah S. Watson and J. Curry Watson, amounting to about fifteen thousand dollars."

W. H. H. MILLER,
Attorney-General of the United States.

GEO. PATRICK,
Solicitor for Complainant.

59 Filed by leave of the court 5th day of January, 1891.

J. W. DIMMICK, *Clerk.*

Demurrer of Friedman Vinegar and Cider Works.

Circuit court of the United States, for the middle district of Alabama.
In equity.

UNITED STATES
vs.
EUGENE BEEBE ET ALS.

The separate demurrer of the Friedman Vinegar and Cider Works to the bill of complaint filed in the above-stated cause by the United States against the said Beebe, this defendant, and others.

This defendant says that they are advised that there is good cause of demurrer to said bill of complaint, and by protestation not by confessing any of the matters and things to be true as therein alleged and set forth, it demurs to the same bill of complaint and for cause of demurrer assigns the following:

I. That said bill of complaint contains no matter of equity whereon this court can grant any decree or give complainant any relief as against this defendant.

60 II. It appears from the allegations of said bill that the matter of the claim of the complainant against Eugene Beebe and Ferrie Henshaw, which is the foundation of this suit, has been adjudicated in the circuit court of the United States for the middle district of Alabama, in a suit, commenced by the said complainant against the said parties, and no sufficient ground is shown for vacating and setting aside the judgment therein rendered.

III. It appears from the allegations contained in said bill of complaint that the claim of the United States against the said Beebe and said Henshaw has been reduced to judgment, and that the said Beebe has paid said judgment, and the money paid by him has been received and accepted by the complainant, the United States, and said bill contains no offer to refund the said money, and does not show that the same has ever been tendered to the said Beebe.

IV. It appears from the allegations of said bill of complaint that the claim of the United States against the said Beebe and the said Henshaw, which is the foundation of this action, was sued upon in the circuit court of the United States for the middle district of Alabama, a court having jurisdiction thereof, and that in said suit it was ascertained that the amount due from each of the said parties to the United States, was the sum of one hundred dollars; that the said judgment against the said Beebe was paid by him to, and was accepted by, the United States, and there is no fact alleged in the bill which shows that the said judgment was obtained by fraud, accident, or mistake.

61 V. It appears from the allegations of said bill of *of* complaint that the claim of the complainant, the United States, against the said Beebe and the said Henshaw has been litigated in a court having jurisdiction thereof and that the amount due by them to the complainant, the United States, has been ascertained and determined by the judgment of said court, and no facts are alleged in said bill which are sufficient in equity to authorize this court to vacate and set aside said judgment.

VI. It appears from the allegations of said bill of complaint that the amount of the claim in favor of the United States against the said Beebe

has been ascertained and determined by a court of competent jurisdiction, and that the same has been reduced to judgment and paid by the said Beebe; and that the claim in favor of the United States against the said Henshaw has also been ascertained and determined by a court of competent jurisdiction, and the same has been reduced to judgment, and no facts are alleged in said bill authorizing a decree of this court vacating and setting aside said judgment, nor is any necessity shown for this court to take jurisdiction to enforce the collection of said judgment against the estate of the said Henshaw.

VII. The said bill is multifarious in this, that it unites as defendants separate and distinct parties claiming separate and distinct interests in the property sought to be subjected to the payment of the alleged debt to the United States.

62 VIII. Said bill is multifarious in this, that it unites in one and the same action a suit against the said Beebe and those claiming property through and under the said Beebe and a suit against the heirs of the said Ferrie Henshaw, and it is not shown by the allegations of said bill that the claim against the said Beebe and the said Henshaw was a joint claim.

IX. It appears from the allegations of the said bill of complaint that the judgment rendered against the said Beebe and the judgment rendered against the representatives of the said Henshaw were rendered by and with the consent of the district attorney of the United States representing the United States, and it is not shown that the agreement and consent of the said district attorney to the rendition of said judgment was obtained by any fraud practiced on him by the said Beebe or the representative of the said Henshaw or through any accident or mistake, without fault or negligence on the part of the said district attorney.

X. It is shown by the allegations of the said bill of complaint that the judgment sought to be vacated and set aside by this proceeding are valid and binding judgments both upon complainant, the United States, and the said Beebee and the representative of the said Henshaw.

Wherefore, this defendant separately demurs to the said bill of complaint and pray the judgment of this court whether they shall make answer to said bill of complaint otherwise than as aforesaid, and

63 they pray to be hence dismissed, with their costs and charges in this behalf most wrongfully expended.

ARRINGTON & GRAHAM,
Solicitors for Defendants.

We hereby certify that as counsel for defendant in the foregoing demurrer that in our opinion the same are well founded in law and proper to be filed.

ARRINGTON & GRAHAM,
Solicitors for Defendant.

John W. Durr, jr., president of the Friedman Vinegar & Cider Works, a corporation organized under the laws of the State of Alabama, one of the defendants in the above-stated cause and the demurrant in the foregoing demurrer, makes oath that the said demurrer is not interposed for delay of the cause in which it is filed.

JOHN W. DURR, Jr.

Sworn to and subscribed before me on this the 5th day of May, A. D. 1890.

J. M. SAVAGE, *Deputy Clerk.*

Filed in open court May 5th, 1890.

J. W. DIMMICK, *Clerk.*

64 *Demurrer of Montgomery Land & Improvement Co. and Abbie F. Rice.*

Circuit court of the United States for the middle district of Alabama.
In equity.

UNITED STATES
vs.
EUGENE BEEBE ET AL.

The joint and separate demurrer of the Montgomery Land & Improvement Company, the Montgomery Light Company, the Southern Cotton Oil Company, and Abbie F. Rice, four of the defendants to the bill of complaint filed in the above-stated cause by the United States against the said Beebe, these defendants and others.

These defendants say that they are advised that there is good cause of demurrer to said bill of complaint, and by protestation, not confessing any of the matters and things to be true as therein alleged and set forth, they do jointly and separately demur to the said bill of complaint, and for cause of demurrer assign the following:

I. That said bill of complaint contains no matter of equity whereon this court can grant any decree or give complainant any relief as against these defendants.

65 II. It appears from the allegations of said bill that the matter of the claim of the complainant against Eugene Beebe and Ferrie Henshaw, which is the foundation of this suit, has been adjudicated in the circuit court of the United States for the middle district of Alabama in a suit commenced by the said complainant against the said parties, and no sufficient ground is shown for vacating and setting aside the judgment therein rendered.

III. It appears from the allegations contained in said bill of complaint that the claim of the United States against the said Beebe and the said Henshaw has been reduced to judgment and that the said Beebe has paid said judgment and the money paid by him has been received and accepted by the complainant, the United States, and said bill contains no offer to refund the said money and does not show that the same has ever been tendered to the said Beebe.

IV. It appears from the allegations of said bill of complaint that the claim of the United States against the said Beebe and the said Henshaw, which is the foundation of this action, was sued upon in the circuit court of the United States for the middle district of Alabama, a court having jurisdiction thereof, and that in said suit it was ascertained that the amount due from each of the said parties to the United States was the

sum of one hundred dollars; that the said judgment against the said Beebe was paid by him to and accepted by the United States, and there is no fact alleged in the bill which shows that the said judgment was obtained by fraud, accident, or mistake.

66 V. It appears from the allegations of said bill of complaint that the claim of the complainant, the United States, against the said Beebe and the said Henshaw has been litigated in a court having jurisdiction thereof and that the amount due by them to the complainant, the United States, has been ascertained and determined by the judgment of said court, and no facts are alleged in said bill which are sufficient in equity to authorize this court to vacate and set aside said judgment.

VI. It appears from the allegations of said bill of complaint that the amount of the claim in favor of the United States against the said Beebe has been ascertained and determined by a court of competent jurisdiction, and the same has been reduced to judgment, and no facts are alleged in said bill authorizing a decree of this court vacating and setting aside said judgment, nor is there any necessity shown for this court to take jurisdiction to enforce the collection of said judgment against the estate of the said Henshaw.

VII. The said bill is multifarious in this—that it unites as defendants separate and distinct parties claiming separate and distinct interests in the property sought to be subjected to the payment of the alleged debt to the United States.

VIII. Said bill is multifarious in this—that it unites in one and the same action a suit against the said Beebe and those claiming property through and under the said Beebe and a suit against the heirs of the said Ferrie Henshaw, and it is not shown by the allegations of said bill that the claim against the said Beebe and the said Henshaw was a joint claim.

67 IX. It appears from the allegations of said bill of complaint that the judgment rendered against the said Beebe and the judgment rendered against the representatives of the said Henshaw were rendered by and with the consent of the district attorney of the United States, representing the United States, and it is shown that the agreement and consent of the said district attorney to the rendition of said judgment was obtained by any fraud practiced on him by the said Beebe or the representative of the said Henshaw or through any accident or mistake, without fault or negligence on the part of the said district attorney.

X. It is shown by the allegations of said bill of complaint that the judgment sought to be vacated and set aside by this proceeding are valid and binding judgments both upon the complainant, the United States, and the said Beebe and the representative of the said Henshaw.

Wherefore these defendants do jointly and separately demur to the said bill of complaint and pray the judgment of this court whether they shall make answer to said bill of complaint otherwise than as aforesaid, and they pray to be hence dismissed, with their costs and charges in this behalf most wrongfully expended.

TOMPKINS & TROY,
Sols. for Defendant.

68 We hereby certify, as counsel for defendants in the foregoing demurrers, that in our opinion the same are well founded in law and proper to be filed.

TOMPKINS & TROY,
Sols. for Defendants.

H. C. Moses, president of the Montgomery Land and Improvement Company, a corporation organized under the laws of the State of Alabama, one of the defendants in the above-stated cause and one of the demurrants in the foregoing demurrer, makes oath that the said demurrer is not interposed for delay of the cause in which it is filed.

H. C. MOSES.

Sworn to and subscribed to before me this 5th day of May, 1890.

J. W. DIMMICK,
U. S. Comr. Cir. Ct. Mid. Dist. Ala.

Filed the 5th day of May, 1890.

J. W. DIMMICK, *Clerk.*

Demurrer of Eugene Beebe.

In the circuit court of the United States for the middle district of Alabama, fifth district.

UNITED STATES
vs.
EUGENE BEEBE ET AL.

69 The demurrer of Eugene Beebe, defendant, to the bill of complaint in the above-entitled cause.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, does demur to the said bill, and for cause of demurrer shows:

1. That it appears in and by said bill that complainant elected to proceed severally against the parties to the said bond of Widmer, and recovered in such several proceedings a several judgment against this defendant, Eugene Beebe, and against William T. Hatchett, as administrator of the said Ferrie Henshaw, deceased; and that the said complainant has filed a joint bill against said Beebe and the heirs of said Henshaw to set aside said judgment and to get the benefit of a further prosecution of the said original cause of action against each of said original parties. Wherefore this defendant says there is a misjoinder of parties defendants.

2. That said bill of complaint contains no matter of equity whereon this court can grant any decree or *or* give complainant any relief as against this defendant.

3. It appears from the allegations of said bill that the matter of the claim of the complainant against this defendant, Eugene Beebe, and Ferrie, which is the foundation of this suit, has been adjudicated in the

70 circuit court of the United States for the middle district of Alabama in a suit commenced by the *the* said complainant against the said parties, and no sufficient ground is shown for vacating and setting aside the judgement therein rendered.

3. It appears from the allegations contained in said bill of complaint that the claim of the United States against this defendant, said Beebe, and the said Henshaw has been reduced to judgment, and that the said Beebe has paid said judgment, and the money paid by him has been received and accepted by complainant, The United States, and said bill contains no offer to refund the said money, and does not show that the same has ever been tendered to defendant, Eugene Beebe.

4. It appears from the allegations of said bill of complaint that the claim of the United States against this defendant, Beebe, and the said Henshaw, which is the foundation of this action, was sued on in the circuit court of the United States for the middle district of Alabama, a court having jurisdiction thereof, and that in said suit it was ascertained that the amount due from each of the said parties to the United States was the sum of one hundred dollars; that the said judgment against the said Beebe was paid by him to and accepted by the United States, and there is no fact alleged in the bill which shows that the said judgment was obtained by fraud, accident, or mistake.

5. It appears from the allegations of said bill of complaint that the claim of the complainant, The *the* United States, against this defend-
71 ant, Beebe, and the said Henshaw has been litigated in a court having jurisdiction thereof, and that the amount due by them to the complainant, The United States, has been ascertained and determined by the judgment of said court; and no facts are alleged in said bill which are sufficient in equity to authorize this court to vacate and set aside judgment.

6. It appears from the allegations of said bill of complaint that the amount of the claim in favor of the United States against defendant Eugene Beebe has been a'certained and determined by a court of competent jurisdiction, and the same has been reduced to judgment and paid by this defendant Beebe; and that the claim in favor of the United States against said Henshaw has also been ascertained and determined by a court of competent jurisdiction, and the same has been reduced to judgment; and no facts are alleged in said bill authorizing a decree of this court vacating and setting aside said judgment, nor is any necessity shown for this court to take jurisdiction to enforce collection of said judgment against the estate of either this defendant Beebe or said Henshaw.

7. The said bill is multifarious in this, that it unites as defendants separate and distinct parties, claiming separate and distinct interests in the property sought to be subjected to the payment of the alleged debt to the United States.

8. Said bill is multifarious in this, that it unites in one and the same action a suit against said defendant Beebe and those claiming
72 property through and under the defendant Beebe and a suit against the heirs of the said Ferrie Henshaw, and it is not shown by the allegations of said bill that the claim against the said Beebe and said Henshaw was a joint claim.

9. It appears from the allegations of said bill of complaint that the judgment rendered against the representatives of the said Hnsshaw was rendered by and with the consent of the district attorney of the United States, representing the United States, and it is not shown that the agreement and consent of the said district attorney to the rendition of

said judgment was obtained by fraud practiced on him by said Beebe, or the representative of said Henshaw, or through any accident or mistake, without fault or negligence on the part of the district attorney.

10. It is shown by the allegations of said bill of complaint that the judgments sought to be vacated are valid and binding judgments upon the complainant, The United States, and the said Beebe and the said Henshaw.

Wherefore, this defendant demurs to the said bill of complaint, and prays the judgment of this court whether he shall make answer to said bill of complaint otherwise than as aforesaid; and he prays to be hence dismissed. with his costs and charges in this behalf most wrongfully expended.

A. A. WILEY,
Sol. for Defendant Eugene Beebe.

73 I hereby certify, as counsel for defendant in the foregoing demurrers, that in my opinion the same are well founded in law and proper to be filed.

A. W. WILEY,
Sol. for Defendant Beebe.

Eugene Beebe, one of the defendants, in the above-entitled cause and the demurrant in the foregoing demurrer, makes oath that said demurrer is not interposed for delay of the cause in which it is filed.

EUGENE BEEBE.

Sworn to and subscribed before me this 9th day of May, 1890.

J. W. DIMMICK.

Filed in open court May 9, 1890.

J. W. DIMMICK, *Clerk.*

Demurrer of Wm. A. Henshaw et als.

In the circuit court of the United States for the middle district of Alabama. Fifth circuit.

UNITED STATES
vs.
EUGENE BEEBE ET AL.

The demurrer of William A. Henshaw and Christiana Henshaw his wife; Cornelia Henshaw, Samuel Henshaw, and Mary S. Henshaw his wife; Sarah R. Buxton, George A. Henshaw and Zuriah E. Henshaw his wife; Annie M. Henshaw, Kate G. Henshaw, Daisy S. Henshaw, and Cathrine I. Ferris, defendants to the bill of complaint of the United States, the above-named plaintiff.

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These defendants by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, do demur to said bill and for cause of demurrer show:

1. That it appears in and by said bill that the complainant elected to proceed severally against the parties to the said bond of Widmer, and recovered in such several proceeding a several judgment against said Eugene Beebe and against William T. Hatchett as administrator of said

Ferrie Henshaw, and that the said complainant has filed a joint bill against the said Beebe and the heirs of said Henshaw to set aside said judgment and to get the benefit of a further prosecution of the said original cause of action against each of said original parties. Wherefore these defendants say there is a misjoinder of them with said Beebe, that they have no concern or interest in the prosecution or defense of said cause as to said Beebe, nor has he any in the prosecution or defense of the action as to these defendants.

2. That said bill does not aver or show any ground for vacating, by the equitable interference of this court, the judgment shown by said bill to have been rendered against the administrator of Ferrie Henshaw merging complainant's claim therein: In this, the said bill does not
75 show that said judgment was obtained by accident, mistake, or fraud of the defendant in said original suit without the fault or negligence of the complainant in said original suit.

3d. That it appears in and by said bill that the said complainant's claim is merged in the judgment therein mentioned to have been rendered against the administrator of Ferrie Henshaw, which said judgment the bill claims is still due and unpaid to complainant; and that said bill does not show anything whatever to impeach the regularity and validity of said judgment on a collateral attack thereof as by said bill is made; that the said bill only sets up acts on the part of the said administrator of Ferrie Henshaw, which were legal in all respects and which he had a right to do in the manner stated in said bill to have been done, and which if they deceived the district attorney of the complainant amount to no fraud in law.

4th. That the acts of said administrator of Ferrie Henshaw set up in said bill as grounds for vacating said judgment are shown by said bill to have been done in open court and in adversary proceedings and by way of answer and defense to the then pending suit against him, and if complainant's solicitor in said cause relied on or was deceived by the same to the detriment of complainant it was the result wholly of his own fault or negligence for which said administrator and these respondents are not to be charged.

5th. That it appears in and by said bill that the judgment therein mentioned as having been rendered against the administrator of
76 said Ferrie Henshaw and, which merged the complainant's claim was duly and regularly rendered by a court having jurisdiction of the subject-matter and parties in adversary proceedings; and that it does not appear that there existed any relation of trust or confidence, or other relation between complainant, or its agents or attorneys and the said Hatchett as administrator of Ferrie Henshaw, making it incumbent on the latter not to make all the statements and not to do all of the acts alleged to have been made and done in open court as an inducement to and to procure the rendition of said judgment; and that it does appear in and by said bill that if said complainant's attorney in said suit at law relied on said statements and acts he did so at his peril and at the peril of complainant's cause, and that it was in no way incumbent upon the said administrator to take charge and manage both sides of the same cause, and that his failure to do so is no cause in equity for vacating said judgment.

6th. That the said bill does not show that the complainant has a good

cause of action against the estate of said Ferrie Henshaw, deceased, and against the respondents as heirs of said Henshaw, if the said judgment was vacated as prayed for in said bill.

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendants do demur thereto, and hereby demand the judgment of this court whether they shall be compelled to make any further or other answer to said bill; and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

SEMPLE & GUNTER,
Sol. for Demurrants.

77 UNITED STATES OF AMERICA,
Southern District of New York, City and State of New York:

Before me, a United States commissioner in and for southern district of New York, personally appeared George A. Henshaw, one of the demurrants above mentioned, who, being first duly sworn, doth depose and say that the foregoing demurrer is not interposed for delay.

GEO. A. HENSHAW.

Subscribed and sworn to before me this 1st day of May, 1890.

JOSEPH A. WELCH,
U. S. Commissioner, Southern Dist. New York.

I, William A. Gunter, of counsel for the demurrants above mentioned in said cause, hereby certify that the aforegoing demurrer is in my opinion well founded in point of law.

W. A. GUNTER,
Sol. for Demurrants Above Mentioned.

Filed by leave of court this 9th day of May, A. D. 1890.

J. W. DIMMICK, *Clerk.*

78 *Order sustaining demurrers and allowing amendment.*

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES, COMPLAINANT,
against
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, THE Montgomery Light Company, The Montgomery Land and Improvement Company, The Friedman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice, et al., defendants.

This cause coming on to be heard upon demurrer to the original bill, and the same having been argued by Mr. Geo. H. Patrick, special assistant U. S. attorney, for complain't, and by Messrs. Henry C. Tompkins and William A. Gunter for defendants, and being understood by the court, it is considered that said demurrer is well taken, and be and the same hereby is sustained; and on motion of complainant's said solicitor, it is

ordered that complainant have leave to amend said bill of complaint on or before the rule day, the first Monday in December, 1890.

DON A. PARDEE,
U. S. Circuit Judge.

79 In open court, November 6th, 1890.
Filed November 6th, 1890.

J. W. DIMMICK, *Clerk.*

Petition for amendment to original bill.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES, COMPLAINANT,
vs.
WILLIAM A. HENSHAW ET AL., EUGENE BEEBE, The Montgomery Light Company, The Montgomery Land and Improvement Co., The Friedman Vinegar and Cider Works, Cleveland Cider Company, The Southern Cotton Oil Company, Abbie F. Rice, et al., defendants. } No. 122.

Comes the complainant, the United States, by Geo. H. Patrick, special assistant U. S. attorney, and respectfully petitions for an order allowing the bill of complaint in the above-entitled cause to be amended, according to the rules of practice in equity for the courts of the United States.

GEO. H. PATRICK,
Special Assistant U. S. Attorney,
Solicitor and of Counsel for Complainant.

To the Honorable DON A. PARDEE, *U. S. Circuit Judge.*

80 *Order allowing amendment.*

AT CHAMBERS, *November 27th, 1890.*

Ordered that said complainant, the United States, have leave to amend said bill of complaint, on or before the rule day, the 1st Monday in January, 1891.

DON A. PARDEE,
U. S. Circuit Judge.

Filed Nov. 28th, 1890.

J. W. DIMMICK, *Clerk.*

Demurrer of Montgomery Land & Improvement Co. and Abbie F. Rice to bill as amended.

Circuit court of the U. S. middle district, State of Alabama. In equity.

THE UNITED STATES
vs.
EUGENE BEEBE ET ALS.

The joint and separate demurrer of the Montgomery Land & Improvement Company, the Montgomery Light Company, the Southern Cotton

Oil Company, and Abbie F. Rice, four of the defendants to the bill of complaint as amended, filed in the above-stated cause against the said Beebe, these defendants, and other.

81 These defendants, jointly and separately, say that they are advised that there is good cause of demurrer to the said bill of complaint as amended, and by protestation, not confessing or admitting any of the matters and things to be true as therein alleged and set forth, they do jointly and separately demur to the said bill of complaint as amended, and for cause of demurrer assign the following:

1. They assign to said bill as amended separately each ground of demurrer assigned to the original bill of complaint filed in this cause as shown and set forth in the demurrer filed by them therein on the 5th day of May, 1890, which said demurrer is hereby referred to and adopted as a demurrer to the said bill as amended.

And as additional grounds of demurrer these demurrants further show:

2. That said amended bill make a new case.

3. That the matter stated in said amendment is not germane to the purpose and object of the original bill and is new matter.

4. That said bill as amended is multifarious in this that the subject-matter of said original bill are two disconnected and separate subjects sought to be litigated in the said bill as amended.

82 5. That the said bill as amended is multifarious in this that in the said original bill it is sought to vacate and set aside certain judgments, one rendered against the said Beebe, and the other against one Hatchett as administrator of Henshaw, whereas the matter set up in the amended bill seeks the collection of a judgment rendered on a distinct cause of action against the defendant Beebe.

And these defendants specially demur to so much of the said bill as amended as claims relief on the judgment of December 26, 1878, and for cause of demurrer show:

1st. That it does not appear in and by the allegations of said amended bill that the said Ferrie Henshaw, under whom these defendants claim a portion of the property involved in this suit, or that his heirs after his death, had any notice or knowledge of *or* the alleged claim of the complainant evidenced by said judgment, or that having such notice he or they had any of the property so conveyed by the said Beebe, or after said notice made any payment of the debts of the said Beebe therefrom in derogation of the right of the complainant.

2. That said matter set up in said bill as amended is distinct and separate subject-matter from the subject-matter of the original bill filed in this action.

Wherefore these defendants do jointly and sep'rately demur to the said bill of complaint as amended, and pray the judgment of this

83 court whether they shall make answer to the said bill of complaint otherwise than as aforesaid, and they pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully expended.

TOMPKINS & TROY,
Solicitors for Defendants.

We hereby certify, as counsel for the defendants in the foregoing demurrers that, in our opinion, the same are well founded in law and proper to be filed.

TOMPKINS & TROY,
Solicitors for Defendants.

H. C. Moses, the president of the Montgomery Land & Improvement Company, a corporation organized under the laws of the State of Alabama, one of the defendants in the above-stated cause and one of the demurrants in the foregoing demurrers, makes oath that the foregoing demurrers are not interposed for delay of the cause in which they are filed.

H. C. MOSES.

Sworn to and subscribed before me this 29th day of April, 1891.

FRED S. BALL,
Notary Public.

Filed the 29th day of Apr., 1891.

J. W. DIMMICK, *Clerk.*

84 *Demurrer of Friedman Vinegar & Cider Works to bill as amended.*

In the circuit court of the United State' for the middle district of Alabama. In equity.

UNITED STATES
vs.
EUGENE BEEBE ET ALS.

The separate demurrer of the Freidman Vinegar and Cider Works to the bill of complaint filed in the above-stated cause by the United States against said Beebe, this defendant and others, as amended.

This defendant, by protestation not confessing any or all of the matters and things in the plaintiff's bill of complaint as amended contained, to be true in such manner and form as the same is therein set forth and alleged, demurs to the said bill as amended, and for cause of demurrer assigns and shows the several grounds specifically set forth in the demurrer filed to the original bill on the 9th day of May in behalf of this demurrant, which said demurrer is hereby referred to and adopted as a demurrer to the said bill as amended. And as additional grounds of demurrer the demurrant further shows:

That the said bill makes a new case, and that the said amendment is not germane to the purpose and object of the original bill and renders the amended bill multifarious, in this, that there are now two dis-
85 tinct and disconnected subjects sought to be litigated in the said bill as amended; one the vacation of a judgment upon a distinct cause of action, the other for the collection of a judgment upon a distinct cause of action.

And as to so much of said bill as amended as claims relief in reference to the said debt, evidenced by said judgment of the 26th of December, 1878, this defendant demurs, and for cause of demurrer shows:

1. That the said amended bill does not aver or show, as to the new matter incorporated by the amendment, that the said Ferrie Henshaw

had during his life, or that his heirs after his death, had any notice or knowledge of the said alleged claim of the complainant, evidenced by said judgment of the 26th day of December, 1877, or, having such notice, that he or they had then any of the said property, so conveyed by the *said property, so conveyed by the* said Beebe, or, after such notice, that he or they had then any of the said property, so conveyed by the said Beebe, or, after such notice, made any payments of the debts of said Beebe therefrom in derogation of the right of complainant.

2. That the said amended bill does not show that the said property, or any part thereof, or the funds thereof, so conveyed by said Beebe to said Ferrie Henshaw, is now, or was, at the date of the filing of said original or amended bill, in the possession of this defendant, or that it is in any way responsible for said property or any part thereof to complainant.

86 Whereupon and for divers other good causes of demurrer, appearing in said bill as amended, the defendant demurs thereto, and hereby demands the judgment of the court whether it shall be compelled to make any other, further, or other answer to said bill as amended, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

ARRINGTON & GRAHAM,
Sol's for Deft. Freidman Vinegar and Cider Works.

We hereby certify that, as counsel for defendant in the foregoing demurrer, that in our opinion the same are well founded in law and proper to be filed.

ARRINGTON & GRAHAM,
Solrs. for Dft.

John W. Durr, jr., President of the Freidman Vinegar and Cider Works, a corporation organized under the laws of the State of Alabama, one of the defendants in the above-stated cause, and the demurrant in the foregoing demurrer makes oath that the said demurrer is not interposed for delay of the cause in which it is filed.

JOHN W. DURR, JR.

Sworn to and subscribed to before me this the 29th day of May, 1891.
J. W. DIMMICK, *Clerk.*

Filed the 29th day of May, 1891.
J. W. DIMMICK, *Clerk.*

87 *Demurrer of Eugene Beebe to bill as amended.*

In the circuit court of the United States for the middle district of Alabama. Fifth circuit.

UNITED STATES
vs.
EUGENE BEEBE ET AL.

The demurrer of Eugene Beebe, one of the defendants to the bill of complaint of the United States, the above-named plaintiffs, as amended.

The defendant, by protestation not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, does demur to the said bill as amended, and for cause of demurrer assigns and shows the several grounds specifically set forth in the demurrer filed to the original bill on the 9th day of May in behalf of this demurrant, which said demurrer is hereby referred to and adopted as a demurrer to the said bill as amended. And as additional grounds of demurrer, this demurrant further shows:

That the said amended bill makes a new case, and that the said amendment is not germane to the purpose and object of the original bill and renders the amended bill multifarious, in this, that there are now two distinct and disconnected subjects sought to be litigated in the said bill as amended; one, the vacation of a judgment upon a distinct cause of
88 action, the other for the collection of a judgment upon a distinct cause of action.

And as to so much of said bill as amended as claims relief in reference to the said debt, evidenced by said judgment of the 26th of December, 1878, this defendant demurs, and for cause of demurrer shows:

1. That the said amended bill does not aver or show, as to the new matter incorporated by the amendment, that the said Ferrie Henshaw had during his life, or that his heirs after his death, had any notice or knowledge of the said alleged claim of the complainant, evidenced by the said judgment of the 26th of December, 1878, or that having such notice, that he or they had then any of the said property, so conveyed by the said Beebe, or after such notice made any payment of the debts of said Beebe therefrom in derogation of the right of complaint.

2. That the said amended bill does not show that the said property, or any part thereof, or the funds thereof, so conveyed by said Beebe to said Ferrie Henshaw, is now, or was, at the date of the filing of said original or amended bill, in the possession of this defendant, or that he is in any way responsible for said property or any part thereof to the complainant.

Whereupon and for divers good causes of demurrer, appearing in the said bill, the defendant does demur thereto, and hereby demands the judgment of this court whether he shall be compelled to make
89 any other, further, or other answer to this said bill, and pray to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

A. A. WILEY,
Sol. for Defendant Eugene Beebe.

I, A. A. Wiley, of counsel for defendant, Eugene Beebe, above mentioned in said cause, hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

A. A. WILEY.

UNITED STATES OF AMERICA,
Middle District of Alabama:

Before me, Benj. P. Seals, a United States commissioner in and for the middle district of Alabama, personally appeard Eugene Beebe, one of the

within-named demurrants, who, being first duly sworn, doth depose and say that the above and foregoing is not interposed for delay.

EUGENE BEEBE.

Sworn to and subscribed before me this 20th day of May, A. D. 1891.

BENJ. P. SEALS,
U. S. Commissioner, Mid. Dist. of Ala.

Filed the 20th day of May, 1891.

J. W. DIMMICK, *Clerk.*

90 *Demurrer of Wm. A. Henshaw et als. to bill as amended.*

In the circuit court of the United States for the middle district of Alabama. Fifth circuit.

UNITED STATES
vs.
EUGENE BEEBE ET ALS.

The demurrer of William A. Henshaw, Cornelia H. Henshaw, Samuel Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah E. Henshaw, Annie M. Henshaw, Kate G. Henshaw, and Catherine J. Ferris, defendants to the bill of complaint of the United States, the above-named plaintiff as amended.

The defendants by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, do emur to the said bill as amended, and for cause of demurrer assign and show the several grounds specifically set forth in the demurrer filed to the original bill on the 9th day of May in behalf of these demurrants (except W. H. Buxton), which said demurrer is hereby referred to and adopted as a demurrer to the said bill as amended. And as additional grounds of demurrer these demurrants further show:

91 2. That the said amended bill makes a new case and that the said amendment is not germane to the purpose and object of the original bill and renders the amended bill multifarious in this, that there are now two distinct and disconnected subjects sought to be litigated in the said bill as amended, one, the vacation of a judgment upon a distinct cause of action, the other for the collection of a judgment upon a distinct cause of action.

And as to so much of said bill as amended as claims relief in reference to the said debt evidenced by said judgment of the 26th of December, 1878, these defendants demur and for cause of demurrer show (1) that the said amended bill does not aver or show as to the new matter incorporated by the amendment that the said Ferrie Henshaw had during his life or that his heirs after his death had any notice or knowledge of the said alleged claim of the complainant evidenced by the said judgment of the 26th of December, 1878, or that having such notice that he or they had then any of the said property so conveyed by the said Beebe or after such notice made any payment of the debts of said Beebe therefrom in derogation of the right of complainant.

11. That the said amended bill does not show that the said property or any part thereof or the funds thereof, so conveyed by said Beebe to said Ferrie Henshaw, is now or was at the date of the filing of said original or amended bill in the possession of these defendants or of any of them or that they or either of them are in any way responsible for said property or any part thereof to the complainant.

92 Whereupon and for divers other good causes of demurrer appearing in the said bill, the defendants do demur thereto, and hereby demand the judgment of this court, whether they shall be compelled to make any other further or other answer to this said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

SEMPLE & GUNTER,
Attorneys.

UNITED STATES OF AMERICA,
Southern District of New York:

Before me, Joseph A. Welch, a United States commissioner in and for the southern district of New York, personally appeared George A. Henshaw, one of the within-named demurrants who, being first duly sworn, doth depose and say that the above and foregoing demurrer is not interposed for delay.

GEORGE A. HENSHAW.

Sworn to and subscribed before me this the 28th day of February, 1891.

JOSEPH A. WELCH,
U. S. Commissioner, Southern District New York.

I, William A. Gunter, of counsel for the demurrants above mentioned in said case, hereby certify that the above and foregoing demurrer is, in my opinion, well founded in point of law.

W. A. GUNTER.

93 Filed March 3, 1891.

J. W. DIMMICK, *Clerk.*

Order sustaining demurrers and dismissing bill.

UNITED STATES
vs.
EUGENE BEEBE ET ALS.

In the circuit court of the United States for the middle district of Alabama. In equity. No. 122.

This cause coming on again to be heard is submitted for decree upon the demurrers filed by the several defendants to the bill of complaint as amended, and the same being argued by counsel and duly examined and understood by the court, it is considered that the said demurrers are well taken.

It is thereupon ordered, adjudged, and decreed by the court that the said demurrers be, and the same are hereby, sustained.

It is further ordered, adjudged, and decreed that the said bill of complaint be, and the same is hereby, dismissed out of this court.

94 This the 29th day of May, 1897.

JOHN BRUCE, *Judge.*

Filed May 31, 1897.

J. W. DIMMICK, *Clerk.*

Order to file bill of revivor and to issue order to show cause, etc.

In the circuit court of the United States for the middle district of Alabama, in the fifth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANT,
against
WILLIAM A. HENSHAW, CORNELIA H. HENSHAW, Samue' W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catharine I.
95 Ferris, Eugene Beebe, The Montgomery Light Company, The Montgomery Land & Improvement Company, The Freidman Vinegar and Cider Works, Abbie F. Rice, The Southern Cotton Oil Company, The Cleveland Cider Company, defendants.

No. 122. In equity.

In this cause, the bill of revivor against the heirs at law of Eugene Beebe, deceased, one of said defendants, to-wit: Julia Mason and Frederick H. Mason, Louisa Berry and William Berry, Walter Beebe and Catherine Beebe, William Beebe and Grace Beebe, and Ida Beebe, being exhibited to the court, it is ordered that the same be filed, and upon motion of Mr. George H. Patrick, special assistant United States attorney, for complainant, it is ordered that the clerk, under his signature and the seal of said court, issue an order directed to each of said persons named as such heirs at law, commanding and requiring them, and each of them, to be and appear before the judge of our said court on the rule day, the first Monday in August, 1895, to show cause, if any they or either of them can, why the suit and proceedings therein had of the United States of America against said William A. Henshaw, Eugene Beebe and others, in said court, should not stand revived, and be revived, against them and each of them, as such heirs at law of said Eugene Beebe, and be in the same plight and condition as the same were at the time of the death of the said Eugene Beebe, and further to
96 stand to and abide such order and decree in the premises as may be made in said cause.

July 18th, 1895.

JOHN BRUCE, *Judge.*

Filed July 18th, 1895.

J. W. DIMMICK, *Clerk.*

Bill of revivor against heirs at law of E. Beebe, deceased.

In the circuit court of the United States for the middle district of Alabama, in the fifth circuit.

THE UNITED STATES OF AMERICA, COMPLAINA'T,
against
WILLIAM A. HENSHAW, CORNELIA H. HENSHAW, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catherine I. Ferris, Eugene Beebe, The Montgomery Light Company, The Montgomery Land & Improvement Company, The Freidman Vinegar and Cider Works, Abbie F. Rice, The Southern Cotton Oil Company, The Cleveland Cider Company, defendants.

No. 122. In equity.

97 To the honorable the justice and judges of the circuit court of the United States for the middle district of Alabama:

United States of America, by its Attorney-General, brings this bill of revivor against Julia Mason and Frederick H. Mason, her husband, residing at Greenpoint, Long Island, New York; Louisa Berry and William Berry, her husband, residing at Newburgh, New York; Walter Beebe and Catherine Beebe, his wife, residing at Newburgh, New York; William Beebe and Grace Beebe, his wife, residing in New York City, New York, all of whom are citizens of the State of New York; and Ida Beebe, an unmarried woman, a citizen of the State of Alabama, residing at Montgomery, in said middle district of Alabama, the heirs at law of Eugene Beebe, deceased, late of Montgomery, Alabama, all being of lawful age; and thereupon orator complains and says:

That on the tenth day of March, 1890, orator filed a bill in equity in this court against William A. Henshaw, Christiana Henshaw, Cornelia H. Henshaw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, George A. Henshaw, Zuriah . Henshaw, Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Dasie B. Henshaw, Catherine I. Ferris, and the heirs at law of Ferrie Henshaw, deceased, late of Montgomery, Alabama; Eugene Beebe, the Montgomery Light Company, the Montgomery Land and Improvement Company, the Freidman Vinegar and Cider Works, Abbie F. Rice, the

98 Southern Cotton Oil Company, and the Cleveland Cider Company, alleging that Eugene Beebe and Ferrie Henshaw were indebted to orator in a large sum, to wit, twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents ($28,158.56), together with interest thereon from January 1, 1873, and that your orator had a prior and paramount lien upon certain real property in Montgomery County, Alabama, within said middle district of Alabama, to wit, the property commonly known as No. 28 Dexter avenue, formerly No. 28 Market street (the Rialto); No. 11 North Perry street, formerly known also as "Washington Hall," and as "Cashin's;" No. 22 South Perry street; No. 109 Dexter avenue, formerly No. 41 Market street, in the city of

Montgomery; and the Montgomery Race Track, near the city of Montgomery and situated in section one (1), township sixteen (16) north, range seventeen (17) east, in section thirty-six (36), township seventeen (17) north, range seventeen (17) east, of which said Eugene Beebe and said Ferrie Henshaw were joint owners in fee simple, and which said property is more fully described in the said bill, by reason of the insolvency of said Beebe and said Henshaw, the assignment of said property, and the other circumstances set up and alleged in said original bill, and seeking a statement of account between the parties, the condemnation and sale of said property to the satisfaction of said indebtedness, the appointment of a receiver, the issuing of an injunction restraining trespassing upon and conveying said property, and other proper relief.

That thereafter, the said parties named as defendants to said bill having been duly served with the writ of subpœna, appeared in said
99 court and filed their demurrers to the said bill of complaint, and the said demurrers were, after argument by counsel and consideration by the court, sustained, with leave to orator to amend said bill of complaint within a certain time specified by the court.

Within the time prescribed, to wit, on January 5th, 1891, orator filed an amendment which set up an additional indebtedness of five hundred and seventy-nine dollars and forty-five cents ($579.45), together with the further sum of fifty-three dollars and eighty-two cents ($53.82), bearing interest from December 26, 1878, and struck out as parties defendant Christiana Henshaw, Florian E. Henshaw, and Gilbert I. Henshaw, and added party defendant, William H. Buxton.

That thereupon the said defendants interposed and filed demurrers to the said bill as amended.

That thereafter, to wit, on August 29th, 1894, said Eugene Beebe died in Montgomery, Alabama, intestate, leaving as his heirs at law said Julia, Mason and Frederick H. Mason, Louisa Berry and William Berry, Walter Beebe and Catherine Beebe, William Beebe and Grace Beebe citizens of the State of New York, and Ida Beebe, a citizen of the State of Alabama, children of James Beebe, deceased, lately a brother of said Eugene Beebe, deceased.

That no answer has yet been filed in said court in said cause.

Wherefore, orator prays that the said cause may be revived by
100 decree of this honorable court, and that it may proceed to a final decree in its favor in accordance with the prayer of the said original bill of complaint herein.

Orator further prays that a writ of subpœna may issue in due form of law, directed to the aforesaid defendants, Julia Mason, Frederick H. Mason, Louisa Berry, William Berry, Walter Beebe, Catherine Beebe, William Beebe, Grace Beebe, and Ida Beebe, heirs at law of said Eugene Beebe, deceased, and requiring them and each of them to appear and show cause, if any they or either of them can, why this cause should not be revived as against them; and if no cause shall be shown by the said

defendants why said bill should not be revived, that a decree be rendered and entered herein reviving said suit in favor of orator accordingly.

And orator will ever pray.

THE UNITED STATES OF AMERICA,
By RICHARD OLNEY,
Attorney-General of the United States.
HENRY D. CLAYTON,
United States Attorney.
GEO. H. PATRICK, *of Counsel.*

Filed July 18, 1895.

J. W. DIMMICK, *Clerk.*

101 *Order to heirs at law to show cause, &c., and marshal's return.*

In the circuit court of the United States for the middle district of Alabama, in the fifth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANT,
against
WILLIAM A. HENSHAW, CORNELIA A. HENSHAW, SAMUEL W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catherine I. Ferris, Eugene Beebe, the Montgomery Light Company, the Montgomery Land & Improvement Company, the Freidman Vinegar and Cider Works, Abbie F. Rice, the Southern Cotton Oil Company, the Cleveland Cider Company, defendants.

No. 122.
In equity.

The President of the United States of America to Julia Mason and
102 Frederick H. Mason, residing at Greenport, Long Island, New York; Louisa Berry and William Berry, and Walter Beebe and Catherine Beebe, residing in Newburgh, New York; William Beebe and Grace Beebe, residing in New York City, New York, all of whom are citizens of the State of New York, and Ida Beebe, a citizen of the State of Alabama, residing in Montgomery, in said middle district of Alabama, heirs at law of the late Eugene Beebe, deceased, greeting:

You are hereby commanded that you, and each of you, personally appear before the judge of our circuit court of the United States for the middle district of Alabama, in the fifth circuit, in equity, on Monday, the fifth day of August, A. D. 1895, wherever the said court shall then be, then and there to show cause, if any you can, why the suit and proceedings therein had of the United States of America against William A. Henshaw, Cornelia H. Henshaw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catherine I. Ferris, Eugene Beebe, the Montgomery Light Company, the Montgomery Land and Improvement Company, the Freidman Vinegar and Cider Works, Abbie F. Rice, the Southern Cotton Oil Company, and the Cleveland Cider Company, defendants, in said court, should not stand revived against you as such heirs at law of said Eugene Beebe, deceased, and be in the same plight and condition as the same

were at the time of the death of the said Eugene Beebe; and further to stand to and abide such order and decree in the premises as may be made in said cause.

103 To the marshal of the United States for the middle district of Alabama to execute.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Montgomery, Alabama, on the 18th day of July, A. D. 1895.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

Received in office this the 20th day of July, 1895.

W. H. TISDALE,
U. S. Marshal.

Executed by serving a copy of the within on Miss Ida Beebe in Montgomery, Ala., this the 20th day of July, 1895, and at same time showing her the original with the seal of the court thereon.

W. H. TISDALE,
U. S. Marshal,
By W. F. ADAMS, *Deputy.*

Filed July 24, 1895.

J. W. DIMMICK, *Clerk.*

104 *Order to heirs to show cause, &c., and marshal's return.*

In the circuit court of the United States for the middle district of Alabama, in the fifth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANT,
against
WILLIAM A. HENSHAW, CORNELIA H. HENSHAW, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catherine I. Ferris, Eugene Beebe, the Montgomery Light Company, the Montgomery Land and Improvement Company, the Freidman Vinegar and Cider Works, Abbie F. Rice, the Southern Cotton Oil Company, Cleveland Cider Company, defendants.

No. 122. In equity.

The President of the United States of America to Julia Mason and
105 Frederick H. Mason, residing at Greenport, Long Island, New York; Louisa Berry and William Berry, and Walter Beebe and Catherine Beebe, residing at Newburgh, New York; William Beebe and Grace Beebe, residing in New York City, New York, all of whom are citizens of the State of New York; and Ida Beebe, a citizen of the State of Alabama, residing in Montgomery, in said middle district of Alabama, heirs at law of the late Eugene Beebe, deceased, greeting:

You are hereby commanded that you, and each of you, personally appear before the judge of our circuit court of the United States for the

middle district of Alabama, in the fifth circuit, in equity, on Monday, the 5th day of August, A. D. 1895, wherever the said court shall then be, then and there to show cause, if any you can, why the suit and proceedings therein had of the United States of America against William A. Henshaw, Cornelia H. Henshaw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Arnie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catherine I. Ferris, Eugene Beebe, The Montgomery Light Company, The Montgomery Land and Improvement Company, The Freidman Vinegar and Cider Works, Abblie F. Rice, The Southern Cotton Oil Company, and the Cleveland Cider Company, defendants, in said court, should not stand revived and be revived against you as such heirs at law of said Eugene Beebe, deceased, and be in the same plights and condition as the same were at the time of the death of the said Eugene Beebe; and further to stand to and abide such order and decree in the premises as may be made in said cause.

106 To the marshal of the United States for the eastern district of New York, to execute.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Montgomery, Alabama, on the eighteenth day of July, A. D. 1895.

J. W. DIMMICK,
Clerk U. S. Circuit Court for the Middle District of Alabama.

This is to certify that the within order was served on the within named Frederick H. Mason and Mrs. Julia Mason at their residence, No. 689 Leonard st., Greenpoint, Brooklyn, N. Y., by showing them this original, and leaving with each of them a true copy thereof on the 23rd day of July, 1895.

HENRY I. HAYDEN,
U. S. Marshal, E. D. of N. Y.

Dated Aug. 5th, 1895.
Filed July 26th, 1895.

J. W. DIMMICK, *Clerk.*

Order to heirs at law of Beebe, to show cause, &c., and marshal's return.

In the circuit court of the United States for the middle district of Alabama, in fifth circuit.

107 THE UNITED STATES OF AMERICA, COMPLAINANT,
against
WILLIAM A. HENSHAW, CORNELIA H. HENSHAW, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catherine I. Ferris, Eugene Beebe, The Montgomery Light Company, The Montgomery Land and Improvement Co., The Friedman Vinegar and Cider Works, Abbie F. Rice, The Southern Cotton Oil Company, Cleveland Cider Company, defendants.
No. 122. In equity.

The President of the United States of America, to Julia Mason and Frederick H. Mason, residing at Greenpoint, Long Island, New York;

Louisa Berry and William Berry, and Walter Beebe and Catherine Beebe, residing in Newburgh, New York; William Beebe and Grace Beebe, residing in New York City, New York, all of whom are citizens of the State of New York; and Ida Beebe, a citizen of the State of Alabama, residing in Montgomery, in said middle district of Alabama, heirs at law of the late Eugene Beebe, deceased, greeting:

108 You are hereby commanded that you, and each of you, personally appear before the judge of our circuit court of the United States for the middle district of Alabama, in the fifth circuit, in equity, on Monday, the fifth day of August, A. D. 1895, wherever the said court shall then be, then and there to show cause, if any you can, why the suit and proceedings therein had of the United States of America against William A. Henshaw, Cornelia H. Henshaw, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisy B. Henshaw, Catherine I. Ferris, Eugene Beebe, The Montgomery Light Company, The Montgomery Land and Improvement Company, The Freidman Vinegar and Cider Works, Abbie F. Rice, The Southern Cotton Oil Company, and the Cleveland Cider Company, defendants in said court, should not stand revived and be revived against you as such heirs at law of said Eugene Beebe, deceased, and be in the same plight and condition as the same were at the time of the death of the said Eugene Beebe; and further to stand to and abide such order and decree in the premises as may be made in said cause.

To the marshal of the United States for the southern district of New York, to execute.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Montgomery, Alabama, on the eighteenth day of July, A. D. 1895.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

109 I do hereby certify that on the 24th day of July, 1895, at the city of Newburgh, New York, in my district, I personally served the within order upon Walter Beebe and his wife, Catherine Beebe, and William Berry and his wife, Louisa Berry, as heirs at law of the within named Eugene Beebe, deceased, by exhibiting to them the within original, and at the same time delivering to and leaving with each of them a copy thereof.

And I do further certify that on the 26th day of July, 1895, at the city of New York, in my district, I personally served the within order upon William Beebe and his wife, Grace Beebe, as heirs at law of the within-named Eugene Beebe, deceased, by exhibiting to them the within original, and at the same time delivering to and leaving with each of them a copy thereof.

JOHN H. MCCURTY,
U. S. Marshal, S. D., N. Y.

Dated New York, August 1st, 1895.
Filed August 12th, 1895.

J. W. DIMMICK, *Clerk.*

Demurrer of W. R. Waller, adm'r of Eugene Beebe, dec'd, to bill as amended.

In the circuit court of the United States, middle district of Alabama.
In equity.

THE UNITED STATES
vs.
EUGENE BEEBE ET ALS.

110 The demurrer of W. R. Waller, administrator of Eugene Beebe, deceased, to the bill of complaint as amended and revived, filed in the above-stated cause against the said W. R. Waller, administrator, &c., and others.

This defendant says that he is advised that there is good cause of demurrer to the said bill of complaint as amended and revived against him, and by protestation, not confessing or admitting any of the matters and things to be true as therein alleged and set forth, does demur to the said bill of complaint as amended and revived against him, and for cause of demurrer assigns the following:

He assigns each ground of demurrer heretofore assigned and set out in the demurrer filed by the said Eugene Beebe to the said amended bill of complaint, and filed in this cause on the 20th day of May, 1891, and asks that this demurrer be taken and treated as if the several grounds of demurrer set out therein were fully set out and stated therein.

Whereupon, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto and hereby demands the judgment of this court whether he shall be compelled to make any other or further answer to the said bill of complaint as amended and revived against him, and prays to be hence dismissed with his cost and charges in this behalf most wrongfully sustained.

TOMPKINS & TROY,
Solicitors for Defendant.

111 We, the solicitors for the demurrant above mentioned in said cause, hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law.

TOMPKINS & TROY,
Solicitors for Defendant.

STATE OF ALABAMA, *Montgomery County.*

Before me, Harris Gunter, a notary public in and for said State and county, personally appeared W. R. Waller, demurrant above named, who is known to me, and who, being first duly sworn, doth depose and say that the above and foregoing demurrer is not interposed for delay.

W. R. WALLER.

Sworn to and subscribed in my presence this 8th day of February, 1896.

HARRIS GUNTER,
Notary Public, &c.

Filed this 8th day of February, 1896.

J. W. DIMMICK, *Clerk.*

Demurrer of Julia Mason et als., to bill as amended.

In the circuit court of the United States, middle district of Alabama.
In equity.

112 THE UNITED STATES
vs.
EUGENE BEEBE ET ALS.

The joint and separate demurrer of Julia Mason, Frederick H. Mason, Louisa Berry, William Berry, Walter Beebe, Catherine Beebe, Grace Beebe, and Ida Beebe, defendants, to the bill of complaint as amended and revived, filed in the above-stated cause against the said Eugene Beebe and others.

These defendants jointly and separately say that they are advised that there is good cause of demurrer to the said bill of complaint as amended and revived against them, and by protestation, not confessing or admitting any of the matters and things to be true as therein alleged and set forth, they do jointly and separately demur to the said bill of complaint as amended and as revived against them, and for cause of demurrer assign the following:

They assign each ground of demurrer heretofore assigned and set out in the demurrer filed by the said Eugene Beebe to the said bill of complaint, and filed in this cause on the 20th day of May, 1891, and ask*s* that this demurrer be taken and treated as if the several grounds of demurrer set out therein were fully set out and stated herein.

Whereupon, and for divers other good causes of demurrer appearing in the said bill, the defendants do demur thereto and hereby demand the judgment of this court whether they shall be compelled to make
113 any other or further answer to the said bill of complaint as amended and revived against them, and pray to be hence dismissed with their cost and charges in this behalf most wrongfully sustained.

TOMPKINS & TROY,
Solicitors for Defendants.

We, solicitors for the demurrants above mentioned in said cause, hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law.

TOMPKINS & TROY,
Solicitors for Defendants.

STATE OF ALABAMA, *Montgomery County.*

Before me, W. H. Thomas, a notary public in and for said State and county, personally appeared Ida Beebe, one of the demurrants above named, who is known to me, and who, being first duly sworn, doth depose and say that the above and foregoing demurrer is not interposed for delay.

MISS IDA BEEBE.

Sworn to and subscribed before me this 8th day of February, 1896.

W. H. THOMAS,
Notary Public, &c.

Filed this 8th day of February, 1896.

J. W. DIMMICK, *Clerk.*

114 *Plaintiff sets down demurrers to be argued.*

In the circuit court of the United States for the middle district of Alabama, in the fifth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANT,
against
WILLIAM A. HENSHAW, CORNELIA H. HENSHAW, Samuel W. Henshaw, Mary S. Henshaw, Sarah R. Buxton, William H. Buxton, George A. Henshaw, Zuriah Henshaw, Annie M. Henshaw, Kate G. Henshaw, Daisie B. Henshaw, Catherine I. Ferris, Eugene Beebe, Julia Mason, Frederick H. Mason, Louisa Berry, William Berry, Walter Beebe, Catherine Beebe, William Beebe, Grace Beebe, Ida Beebe, The Montgomery Light Company, The Montgomery Land and Improvement Company, The Freidman Vinegar and Cider Works, Abbie F. Rice, The Southern Cotton Oil Company, Cleveland Cider Company, William R. Waller, as administrator of Eugene Beebe, defendants.

No. 122, in equity.

The complainant, the United States of America, sets down the demurrers of the defendants to the bill of complaint as amended herein, to be argued before the honorable the circuit justice and the circuit
115 judges, or either of them, of the fifth circuit and middle district of Alabama, on Monday, May 4th, 1896, at 12 o'clock noon.

THE UNITED STATES OF AMERICA,
By HENRY D. CLAYTON,
United States Attorney.

GEO. H. PATRICK,
Special Assistant U. S. Attorney.

At rules, Monday, March 2d, 1896.
Filed and entered March 2, 1896.

J. W. DIMMICK, *Clerk.*

Order sustaining demurrers and dismissing bill.

UNITED STATES
vs.
EUGENE BEEBE ET ALS.

In the circuit court of the United States for the middle district of Alabama. No. 122, in equity.

This cause coming on again to be heard is submitted for decree upon the demurrers filed by the several defendants to the bill of complaint as amended, and the same being argued by counsel and duly examined and understood by the court, it is considered that the said demurrers are well taken.

116 It is thereupon ordered, adjudged, and decreed by the court that the said demurrers be, and the same are hereby, sustained. It is further ordered, adjudged, and decreed that the said bill of complaint be, and the same is hereby, dismissed out of this court.

This the 29th day of May, 1897.

JOHN BRUCE, *Judge.*

Filed May 31, 1897.

J. W. DIMMICK, *Clerk.*

Order allowing appeal and waiver of service of citation.

In the circuit court of the United States for the middle district of Alabama.

Wednesday, June 23, 1897, a day of said court, the following proceedings were had:

THE UNITED STATES
vs.
EUGENE BEEBE, WM. A. HENSHAW, ET AL. } No. 122.

117 In this cause this day in open court comes the plaintiff, by its attorney, W. S. Reese, jr., and prays the court for an appeal and an order allowing the same;

Whereupon it is ordered, adjudged, and decreed that the prayer of plaintiff be allowed.

Assignments of error.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA
vs.
EUGENE BEEBE ET ALS.

To the honorable the judges of said court, and to the Honorable John Bruce, one of the judges thereof:

The United States, the plaintiff in the above-entitled cause, respectfully show unto your honor that on, to wit, the 29th day of May, 1807, a decree was made and entered in said cause decreeing and adjudging that the bill filed by plaintiff in said cause be dismissed out of court.

The plaintiff having prayed an appeal, as required by law, from said decree dismissing said bill, and for a review of said decree and the other orders and decrees of the court made in this cause prior to said

118 decree, to the United States circuit court of appeals for the fifth circuit, and pray for a reversal decree, and submit the following assignments of error:

First. The circuit court erred in sustaining the demurrers of the Montgomery Land and Improvement Company, The Montgomery Light Company, The Southern Cotton Oil Company, and Abbie F. Rice, filed in the circuit court on the 5th day of May, 1890.

Second. The circuit court erred in sustaining the demurrers of the Friedman Vinegar and Cider Works, filed in said cause on the 5th day of May, 1890.

Third. The circuit court erred in sustaining the demurrer of Eugene Beebe, filed in said cause on the 9th of May, 1890.

Fourth. The circuit court erred in sustaining the demurrers of William A. Henshaw and others, filed in said cause on the 9th day of May, 1890.

Fifth. The circuit court erred in sustaining the demurrers of William A. Henshaw and others, filed in said cause on the 3rd day of March, 1891.

Sixth. The circuit court erred in sustaining the demurrers of the Montgomery Land and Improvement Company, The Montgomery Light Company, The Southern Cotton Oil Company, and Abbie F. Rice, filed in said cause on the 29th day of May, 1891.

Seventh. The circuit court erred in sustaining the demurrers of Eugene Beebe, filed in said cause on the 20th day of May, 1891.

119 Eighth. The circuit court erred in sustaining the demurrers of the Friedman Vinegar and Cider Works, filed in said cause on the 29th day of May, 1891.

Ninth. The circuit court erred in dismissing the bill of complaint in this cause, as shown by order made and entered on the 28th day of May, 1897.

And said plaintiffs pray all necessary orders and process in the consideration and revision of said decree by the circuit court of appeals for the fifth circuit.

THE UNITED STATES OF AMERICA,
By WARREN S. REESE, Jr.,
United States Attorney.

Order allowing appeal.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE UNITED STATES OF AMERICA)
vs.)
EUGENE BEEBE ET ALS.)

The United States, the plaintiff in the above-entitled cause, having prayed an appeal to the circuit court of appeals for the fifth circuit from the decree of this court dismissing the bill, and the plaintiffs having complied with the law, it is ordered that said appeal be allowed.

Done at Montgomery, Alabama, this 21st day of August, 1897.

JOHN BRUCE, *Judge.*

120 Filed August 21, 1897.

J. W. DIMMICK, *Clerk.*

Citation of appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Eugene Beebe, William Henshaw and others, The Montgomery Light Company, The Montgomery Land & Improvement Company, The Southern Cotton Oil Company, Abbie F. Rice, The Freidman Vinegar & Cider Works, et als.

You are hereby cited to be and appear before the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to an order of appeal granted

and filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein the United States of America are appellant and you are appellees, to show cause, if any, why the decree rendered against the appellant as in said order of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

121 Witness the hand of the honorable John Bruce, judge of the district court of the United States, this 21st day of August, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN BRUCE, *Judge.*

Service of the within citation is hereby accepted and waived, and time within which transcript is to be filed at New Orleans, La., is hereby extended to October 1st, 1897.

TOMPKINS & TROY,
Attys. for Appellees.

Aug. 21st, 1897.

Certificate of clerk.

UNITED STATES OF AMERICA,
Middle District of Alabama, ss:

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, hereby certify that the foregoing pages, numbered from one to fifty-three inclusive, contain a full, true,

122 and complete transcript of the record and proceedings in a cause lately depending in said court, wherein The United States of America was complainant and Eugene Beebe and others defendants, as the same appear of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed at Montgomery, in said district, this the 26th day of August, A. D. 1897.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

[Seal of the United States circuit court, middle district of Alabama.]

123 United States circuit court of appeals, fifth circuit.

NOVEMBER TERM, 1897. *Monday, May 23, 1898.*

[Extract from minutes.]

UNITED STATES
vs.
EUGENE BEEBE ET AL. } No. 639.

This cause was regularly called this day, and after argument by Mr. J. Ward Gurley for appellant, and by Mr. W. A. Gunter and Mr. H. C. Tompkins for appellees, was submitted to the court.

NOVEMBER TERM, 1898. *Tuesday, February 21, 1899.*

[Extract from minutes.]

UNITED STATES
vs.
EUGENE BEEBE ET AL. } No. 639.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the middle district of Alabama, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

124 United States circuit court of appeals, fifth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
EUGENE BEEBE ET AL., APPELLEES. } No. 639.

Petition for appeal.

The petition of the United States of America, through W. S. Reese, jr., United States attorney for the middle district of Alabama, and J. Ward Gurley, United States attorney for the eastern district of Louisiana, under the direction of the Attorney-General of the United States, represents that in the final decree of said circuit court of appeals, rendered on the 21st day of February, 1899, there is manifest error to their injury, and therefore they respectfully pray for an order granting an appeal from said decree to the Supreme Court of the United States.

U. S. REESE, Jr.,
U. S. Attorney for Middle District of Alabama,
J. WARD GURLEY,
U. S. Attorney for the Eastern District of Louisiana,
Solicitors for Appellants.

(Endorsed:) United States circuit court of appeals, fifth circuit. Petition for appeal. Filed April 12, 1899. J. M. McKee, clerk.

125 United States circuit court of appeals, fifth circuit.

UNITED STATES OF AMERICA, APPELLANTS,
vs.
EUGENE BEEBE ET AL., APPELLEES. } No. 639.

Assignment of errors.

And now comes the United States of America, by W. S. Reese, jr., U. S. atty. for middle district of Alabama, and J. Ward Gurley, United States attorney for the eastern district of Louisiana, and solicitor for appellants, under the direction of the Attorney-General of the United States, and charges that in the decree rendered by the said circuit court

of appeals in the above-entitled cause on the 21st day of February, 1899, and in the record and proceedings in said court, there is manifest error to their injury in this, to wit:

1. The said circuit court of appeals erred in affirming the decree in said cause of the circuit court of the United States for the middle district of Alabama sustaining the demurrers filed by the appellees and dismissing the bill of complaint of the United States.

2. Said circuit court of appeals erred in not reversing the decree in said cause of the circuit court of the United States for the middle district of Alabama.

3. Said circuit court of appeals erred in not maintaining the bill filed by the United States in said cause and in not remanding the said cause to the circuit court of the United States for the middle district of Alabama for further proceedings under said bill.

126 4. Said circuit court of appeals erred in holding that "The alleged false statements in the suit brought by the United States on the bond in question were not such as to deceive a person of ordinary care."

5. Said circuit court of appeals erred in holding that said statements "could not have deceived the district attorney who represented the Government, either as to the amount due on the bond or as to the property owned by the defendants."

6. The said circuit court of appeals erred in holding that said statements "did not in any way prevent the Government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so."

7. Said circuit court of appeals erred in holding in effect that the rights of the United States were affected by the acceptance by the officers of the Treasury Department of the sum of one hundred dollars, with interest, from Beebe, one of the defendants, in satisfaction of one of the judgments sought to be set aside.

8. Said circuit court of appeals erred in holding that "The facts of the case bring it under the well-known rule announced in U. S. vs. Throckmorton (98 U. S., 61) and the cases following it."

9. The said circuit court of appeals erred in not holding that the judgments against which the bill in this case is directed and which are sought to be set aside were in fact and effect illegal attempts to compromise claims and rights of, and amounts due to, the United States, and therefore void and of no effect.

10. The said circuit court of appeals erred in not holding that neither the officers of the Treasury Department nor the attorney nor any other officer cannot, directly or indirectly, compromise a claim of the United States, except in the manner and form provided by law, and that compromises of claims due to the United States have no validity, force, or effect, even though made through and by means of a judgment obtained for that purpose, unless the special requirements of the law upon

127 the subject have also been followed and complied with.

11. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were obtained by the fraud and misrepresenta-

tion of Beebe, one of the defendants, and of the personal representative of Henshaw, another of the defendants, and that said judgments are void.

12. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were in fact and effect nothing more than unauthorized, illegal, null, and void attempts to compromise the claim of the United States against the defendants Beebe and Henshaw of over twenty-eight thousand dollars for the sum of two hundred dollars.

J. WARD GURLEY,
U. S. Attorney, Eastern District of Louisiana, and Solicitor for Appellants.

W. S. REESE, Jr.,
U. S. Attorney for the Middle District of Alabama.

128 United States circuit court of appeals, fifth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
EUGENE BEEBE ET AL., APPELLEES. } No. 639.

Additional assignment of errors.

And now comes the United States of America, by W. S. Reese, jr., United States attorney for the middle district of Alabama, and J. Ward Gurley, United States attorney for the eastern district of Louisiana, and solicitors for appellants, under the direction of the Attorney-General of the United States, and with the permission of the court first obtained, assign the following additional errors in the decree rendered by the circuit court of appeals in the above-entitled cause on the 21st day of February, 1899, and in the record and proceedings in said court therein, to wit:

13. That said circuit court of appeals erred in holding that this is a suit to set aside and annul the judgment of a court regularly entered, in a matter on which it had jurisdiction on the ground only "that the said defendants Beebe and Henshaw stated to the court that they were poor men and were without property; that nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the court and United States attorney, and with the intent to defraud the United States."

W. S. REESE, Jr.,
By J. W. G.
J. WARD GURLEY,
Solicitor for Appellants.

Let this additional assignment of error be filed and made part of the record. May 1, 1899.

A. P. MCCORMICK,
U. S. Circuit Judge.

(Endorsed:) Additional assignments of error. Filed May 1, 1899. J. M. McKee, clerk.

129 United States circuit court of appeals, fifth circuit.

NOVEMBER TERM, 1898, *Wednesday, April 12, 1899.*

[Extract from minutes.]

THE UNITED STATES OF AMERICA, APPELLANTS, *vs.* EUGENE BEEBE ET AL., APPELLEES. } No. 639.

Order allowing appeal.

In this case the United States, by W. S. Reese, jr., United States attorney for the middle district of Alabama, and J. Ward Gurley, United States attorney for the eastern district of Louisiana, under the direction of the Attorney-General of the United States, having made application in writing for an appeal from the final decree therein rendered on the 21st day of February, 1899, to the Supreme Court of the United States, and it appearing that the matter in dispute in said cause exceeds the sum of five thousand dollars, exclusive of costs:

It is therefore ordered that said appeal be, and the same is hereby, granted and made returnable on the 12th day of May, 1899.

April 12, 1899.

A. P. McCORMICK,
Circuit Judge.

(Endorsed:) United States circuit court of appeals, fifth circuit. Order for appeal. Filed April 12th, 1899. J. M. McKee, clerk.

130 United States circuit court of appeals, fifth circuit.

NOVEMBER TERM, 1898, *filed February 21, 1899.*

THE UNITED STATES *vs.* EUGENE BEEBE ET ALS. } No. 639.

Appeal from the circuit court of the United States, middle district of Alabama.

This is an appeal from a decision of the circuit court of the United States for the middle district of Alabama, sustaining a demurrer to bill of complainant. The bill was filed by the United States of America, by its Attorney-General, against Eugene Beebe and others, alleging that the said Eugene Beebe and Ferris Henshaw were sureties on the official bond of one Francis Widmer, collector of internal revenue of the second district of Alabama, in the sum of fifty thousand dollars, conditioned that said Widmer should faithfully perform the duties of said office; that said Widmer did not faithfully perform said duties, but failed to pay over to the United States the sum of twenty-eight thousand one hundred fifty-eight dollars and fifty-six cents, and that said sum is still due, with interest from January 6th, 1874; that on the 3rd day of June, 1880, separate

suits at law were commenced in the circuit court of the United States for the middle district of Alabama against said Eugene Beebe and against William T. Hatchett, administrator of the estate of said Ferris Henshaw, for the recovery of the sums for which said Widmer, as collector, was in default; that said suits were continued until Feb'y 6th, 1885, when judgments were severally entered against said defendants for one hundred dollars each and costs, and said Beebe, on the first day of July, 1886, paid into the Treasury of the United States the sum of one hundred
131 nine dollars and eighty-five cents, the amount of the judgment and costs, but that the judgment against said Hatchett as administrator is due and unpaid.

"That said judgments were entered under the following circumstances: That said defendants came into court and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferrie Henshaw were poor men; and that said Beebe and the estate of said Ferrie Henshaw were without property out of which the said judgments could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their estates, by execution; but that if the court would allow a jury and verdict to be entered against them for one hundred dollars, they, and each of them, would pay said judgments and costs; that no evidence or proof was or had been introduced in said causes, or either of them, and indebtedness of said Beebe and Henshaw to the United States then being twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents ($28,158.56) and interest, or other large sum; and the statements and representations aforesaid only were before the said circuit court at the time of the entry of said judgments; and no hearing or determination upon the law or the facts involved in said cases was ever had in said court; whereupon the court remarked that unless the district attorney of the United States objected, the causes might be disposed of as suggested aforesaid; said district attorney did not object; and said judgments for one hundred dollars and costs were entered in each of said causes; that said statements and representations made as aforesaid by and on behalf of and for said Beebe and said Ferrie Henshaw, and the estate of said Ferrie Henshaw, were wholly untrue, and were made to deceive said court and United States attorney, and for the purpose and with the intent to defraud the United States; that said court and the United States attorney had no authority in law to accept said statements and representations, which were not made under oath nor in the course of any judicial proceeding, and were not, and were not supported nor verified by evidence or proofs; and that said acts of said
132 court and United States attorney amounted in law and in fact to, and was, and was intended to be, a mere naked compromise of the claim and demand of the United States against said Eugene Beebe and Ferrie Henshaw, and the estate of said Ferrie Henshaw, which said court and United States attorney had no authority, but were inhibited by law to make, entertain, and consum'ate; that said court was without jurisdiction and power to determine said causes in the manner aforesaid; and that said alleged judgments for one hundred dollars and costs are null and

void, ab initio, and of no effect, and should be vacated and held for naught in this court of equity."

W. S. REESE, Jr.,
For the United States.
W. A. GUNTER,
For Henshaw Heirs.
H. C. TOMPKINS,
For Montgomery Light Co., The Montgomery Land and Improvement Co., The Southern Cotton Oil Co., Abbie F. Rice and W. R. Waller, Admx.

Before McCormick, circuit judge, and Swayne & Parlange, district judges.

SWAYNE, district judge, delivered the opinion of the court.

It is evident that this is a suit to vacate, annul, and set aside the judgment of a court regularly entered in a matter of which it had jurisdiction, with all the parties before it, on the ground that the said defendants, Beebe and Henshaw, stated to the court that "they were poor men and were without property; that nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the court and the United States attorney and with the intent to defraud the United States."

In United States vs. Throckmorton, 98 U. S. p. 61, Mr. Justice Miller announced the established doctrine on this subject to be "that the acts for which a court of equity will on account of fraud set aside or a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

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It is difficult to see upon what theory the judgment in this case can be set aside. The alleged false statements in the suits brought by the United States on the bond in question were not such as to deceive a person of ordinary care. They could not have deceived the district attorney who represented the Government either as to the amount due on the bond or as to the property owned by the defendants. They did not in any way prevent the Government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so. Then in about fifteen months after the entry of said judgment the Government accepted satisfaction of the same by the officers of the Treasury Department accepting the $100, with interest, from Beebe. We think the facts of this case bring it under the well-known rule announced in U. S. vs. Throckmorton, supra, and the cases following it, and that the judgment below should be affirmed.

134 United States circuit court of appeals for the fifth circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 134 pages, numbered from 0 to 133, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court in the case of The United States vs. Eugene Beebe et als., No. 639, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 8th day of May, A. D. 1899.

[SEAL.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

135 *Citation of appeal.*

THE UNITED STATES OF AMERICA, *Fifth judicial circuit:*

The President of the United States to Eugene Beebe, William A. Henshaw, Christina Henshaw, his wife; Cornelia H. Henshaw, widow of the late Gilbert F. Henshaw; Samuel W. Henshaw and Mary S. Henshaw, his wife; Sarah R. Buxton, William H. Baxton; George A. Henshaw, and Zuriah E. Henshaw, his wife; Annie M. Henshaw, Florian E. Henshaw, Thomas E. Henshaw, Kate G. Henshaw, Dasie B. Henshaw, children of said late Gilbert F. Henshaw, and his heirs at law; Catherine I. Ferris, Julia Mason, Frederick H. Mason, Louisa Berry, William Berry, Walter Beebe, Catherine Beebe, William Beebe, Grace Beebe, Ida Beebe, the Montgomery Light Co., the Montgomery Land & Improvement Co., the Freidman Vinegar & Cider Works; Abbie F. Rice, wife of W. P. Rice; the Southern Cotton Oil Co., Cleveland Cider Co., and William R. Waller, administrator of Eugene Beebe; or to W. A. Gunter and H. C. Tompkins, their solicitors of record, greeting:

You are hereby cited and admonished to be present and appear before the Supreme Court of the United States, at Washington, D. C., within 30 days from the date hereof, pursuant to the appeal sued out and filed in the clerk's office in the United States circuit court of appeals for the fifth circuit in the cause wherein the United States of America were appellants and you were appellees, to show cause, if any there be, why the decree rendered against the United States of America as in said petition for appeal mentioned should not be corrected and why speedy justice should not be done in their behalf.

136 Witness the hand of the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, this 12 day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

A. P. McCORMICK,
U. S. Circuit Judge.

Service of the within citation is hereby accepted.

W. A. GUNTER,
Attorneys for Henshaw Heirs.

ALEX. TROY, surv. part. TOMPKINS & TROY,
Attorneys for Montgomery Light Company, the Montgomery Land and Improvement Company, the Southern Cotton Oil Company, Abbie F. Rice; W. R. Waller, Administrator Walter Beebe; Catherine Beebe, Wm. Beebe, Grace Beebe, & Ida Beebe.

EDWARD A. GRAHAM,
Surviving Partner of Arrington & Graham, Attys. for Freidman Vinegar & Cider Works.

APRIL 18, 1899.

137 (Indorsed:) No. 639. United States circuit court of appeals, fifth circuit. United States of America, appellants, vs. Eugene Beebe et al. Citation of appeal. Filed April 27, 1899. J. M. McKee, Clerk.

138 (Indorsement on cover:) File No. 17424. U. S. C. C. of appeals, fifth circuit. Term No. 310. The United States, appellant, vs. Eugene Beebe, William A. Henshaw, et al. Filed May 23, 1899. Office Supreme Court of U. S. Received May 11, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE UNITED STATES, APPELLANT,
v.
EUGENE BEEBE, WILLIAM A. HENSHAW, et al.

No. 71.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal from a final decree of the circuit court of appeals, fifth circuit, affirming a decree of the circuit court of the United States for the middle district of Alabama, which sustained demurrers by appellees to the bill of complaint herein, and dismissed the bill.

The bill was filed by the United States against Eugene Beebe, the heirs at law of Ferrie Henshaw, and others. Beebe and Henshaw, in June, 1873, became sureties on the official bond of one Francis Widmer, collector of internal revenue for the second district of Alabama, which bond was in the sum of $50,000, conditioned as usual.

Widmer did not faithfully perform the duties of his office, in that he failed and refused to pay over to the Government the sum of $28,158.56, public money, which had come into his possession as such collector. The sum has never been paid to the United States. At the time of the execution of this bond, and for many years thereafter, Beebe and Henshaw owned a large quantity of real estate, which is specifically set out in the bill. Henshaw died in April, 1879, leaving as his heirs at law the numerous parties mentioned in the bill. The bill further states that Eugene Beebe, Ferrie Henshaw, and the estate of Henshaw were, on the date of the filing of the bill, and have been uninterruptedly since and prior to the year 1873, "owners of all the property hereinabove described, which is of the value of $50,000." That in June, 1879, one Hatchett, was appointed administrator of the estate of Henshaw, and in April, 1880, reported the estate as insolvent to the probate court of Montgomery County. In July, 1880, that court declared the estate insolvent. Hatchett was removed as administrator in December, 1882, and one Bellinger was appointed his successor in office. Bellinger resigned the office as administrator in November, 1883, and nothing whatever has been done in the probate court in the matter of this estate.

The estate remains wholly unsettled, and its assets were and are insufficient to pay the debts of said estate. Eugene Beebe was insolvent, and his estate is also insolvent and unable to pay his debts, including the claim of $28,158.56, the subject-matter in this suit.

In June, 1880, *separate* suits at law were begun in the

circuit court of the United States at Montgomery, Ala., against said Beebe, and against William T. Hatchett, as administrator of Henshaw's estate, on Widmer's said bond, to recover the amount of the collector's default. These suits were continued from time to time at the request of said defendants, until February 6, 1885, when judgments were *severally* entered in said court against Hatchett, as administrator of Henshaw, and against said Beebe for $100 and costs. Beebe, on the 1st of July, 1886, paid into the Treasury of the United States $109.85, the amount of the judgment and costs against him, but the judgment against Hatchett, as administrator of Henshaw, has *never* been paid.

The judgments were obtained under the following circumstances: The defendants in open court stated that Beebe and Henshaw were poor men. That Beebe's and Henshaw's estate had no property out of which the Government could make the claim against them. They represented that if the court would allow a jury and verdict against them for $100, *each* of them would pay such judgment and costs. No evidence of any kind was introduced in these cases, or either of them.

The indebtedness of said Beebe and the estate of Henshaw to the Government was $28,158.56 as on account of said Widmer's bond. No hearing on the law or facts of the case was ever had. On Beebe and Hatchett making the statements aforesaid, the presiding judge of the court remarked that unless the district attorney for the United States objected the case might be disposed of as suggested. The district attorney did *not* object, and the judgments were entered in *each* of said cases as suggested

by the defendants. The bill avers that the statements made by the defendants as to solvency were wholly untrue, and were made to deceive the court and the United States attorney, and for the purpose and with the intent to defraud the United States.

It is charged that the district attorney had no authority to accept the statements of the defendants, which were unsworn; that the act of the district attorney was a mere naked compromise of the said large claim of the Government, which neither the district attorney nor the said circuit court had any authority to make, but were inhibited by law to make, entertain, and consummate; that said court was without jurisdiction to determine said cases in the manner in which it was done, and that the judgments as rendered were void *ab initio*, and should be so treated in a court of equity.

The bill goes on to aver that the various other defendants named assert some claim to the real estate named in the bill, but the nature and extent of the claims is not known to complainant. It shows that Beebe had conveyed, or attempted to convey, to Henshaw on the 22d of March, 1877 (see deed marked "Exhibit B," of bill, pp. 22, 23, 24, and 25 of record), but avers that this deed was without consideration, made to hinder, delay, and defraud existing creditors and was null and void, and that all attempted conveyances of the land in question were made in subordination to the complainant's claim against Beebe and Henshaw.

An amendment was made to the bill, the only part material to be mentioned being, that in January, 1872, Beebe became the surety on the official bond of one

Dustan as deputy postmaster at Demopolis, Ala. The bond was in the amount of $12,000 and was payable and conditioned as prescribed by law. That Dustan made default to the Government in the sum of $441.49. That a judgment againt Beebe on this bond was rendered in the United States circuit court aforesaid, December 26, 1878, for $549.45, together with costs, which amounted to $53.82, and that this amount is still due and unpaid.

The following averment was also added to the bill by the amendment, viz, that Henshaw, as assignee of Beebe, under the said deed marked "Exhibit B," and the heirs of Henshaw, had paid various debts of Beebe and had failed to pay the debts evidenced by the judgment on Dustan's bond, which was a prior claim under such assignment or deed, which it will be observed, on inspection, provided for the payment by Henshaw of certain debts of Beebe, and after this was done the real estate was to be reconveyed to Beebe, his heirs or assigns.

The prayer of the original bill is that the said judgment for $100 each against Beebe and Henshaw's administrator be set aside and vacated; that the administration of Henshaw's estate be removed into and settled in the United States circuit court; that an account be stated between the parties before a master, to ascertain the amount due to the United States on account of the liability of Beebe and Henshaw on the the said bond of Widmer as collector; to ascertain and report upon the claims, liens, or incumbrances, if any, upon the said property; and that on the coming in of the report the said sum found due to the Government be held a prior lien and charge on the said real estate; that all conveyances and

assignments of said property in conflict with said lien of the United States be set aside and held for naught, and that the property be sold by the master for the payment of said indebtedness, free of all incumbrances, and the proceeds of the sale, after satisfying the appellant's claim, be distributed among those who are found entitled thereto. There was a prayer for an injunction and receiver of the property *pendente lite*.

All the parties appeared and filed numerous demurrers to the bill as originally filed and as amended. (Rec., pp. 31–39, 40–46, 54, 55.)

The grounds of demurrer are:

1. The bill is without equity.

2. The bill is multifarious.

3. That the claim of the United States against Beebe and Henshaw has been reduced to judgment, and that the said Beebe has paid such judgment, and the money paid by him has been received and accepted by the United States, and the bill contains no offer to refund the said money, and does not show the same has ever been tendered to Beebe.

4. That the claim of the United States has been ascertained by a court of competent jurisdiction, reduced to judgment, and the judgment satisfied; and no facts are alleged authorizing a court of equity to vacate said judgments.

5. That the bill shows that the judgments against Beebe and Henshaw in favor of the Government were rendered by and with the consent of the United States attorney, and fails to show that such consent was obtained by any fraud practiced on the district attorney by Beebe

or the representative of Henshaw, or through any accident or mistake without fault or negligence on the part of the district attorney.

6. That as to the judgment against Beebe on the Dustan bond, the amended bill does not show that Henshaw or his heirs had any notice, or of the Government's claim evidenced by said judgment, or that, having such notice, he or they made any payment on Beebe's debts in derogation of the Government rights.

The demurrers were sustained and the bill dismissed (Record, p. 46); and this decree was affirmed by the circuit court of appeals. From that decree of affirmance this appeal is taken.

ASSIGNMENT OF ERRORS.

The following assignment of errors was filed in the circuit court of appeals (Record, pp. 61, 62):

1. The said circuit court of appeals erred in affirming the decree in said cause of the circuit court of the United States for the middle district of Alabama sustaining the demurrers filed by the appellees and dismissing the bill of complaint of the United States.

2. Said circuit court of appeals erred in not reversing the decree in said cause of the circuit court of the United States for the middle district of Alabama.

3. Said circuit court of appeals erred in not maintaining the bill filed by the United States in said cause, and in not remanding the said cause to the circuit court of the United States for the middle district of Alabama for further proceedings under said bill.

4. Said circuit court of appeals erred in holding that

"the alleged false statements in the suit brought by the United States on the bond in question were not such as to deceive a person of ordinary care."

5. Said circuit court of appeals erred in holding that said statements "could not have deceived the district attorney, who represented the Government, either as to the amount due on the bond or as to the property owned by the defendants."

6. The said circuit court of appeals erred in holding that said statements "did not in any way prevent the Government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so."

7. Said circuit court of appeals erred in holding in effect that the rights of the United States were affected by the acceptance by the officers of the Treasury Department of the sum of $100 with interest, from Beebe, one of the defendants, in satisfaction of one of the judgments sought to be set aside.

8. Said circuit court of appeals erred in holding that "the facts of the case bring it under the well-known rule announced in *United States* v. *Throckmorton* (98 U. S., 61) and the cases following it."

9. The said circuit court of appeals erred in not holding that the judgments against which the bill in this case is directed, and which are sought to be set aside, were in fact and effect illegal attempts to compromise claims and rights of and amounts due to the United States, and therefore void and of no effect.

10. The said circuit court of appeals erred in not holding that neither the officers of the Treasury Department, nor the attorney, nor any other officer can, directly or

indirectly, compromise a claim of the United States, except in the manner and form provided by law, and that compromises of claims due to the United States have no validity, force, or effect, even though made through and by means of a judgment obtained for that purpose, unless the special requirements of the law upon the subject have also been followed and complied with.

11. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were obtained by the fraud and misrepresentation of Beebe, one of the defendants, and of the personal representative of Henshaw, another of the defendants, and that said judgments are void.

12. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were in fact and effect nothing more than unauthorized, illegal, null, and void attempts to compromise the claim of the United States against the defendants Beebe and Henshaw of over $28,000 for the sum of $200.

13. That said circuit court of appeals erred in holding that this is a suit to set aside and annul the judgment of a court, regularly entered, in a matter on which it had jurisdiction on the ground only "that the said defendants Beebe and Henshaw stated to the court that they were poor men and were without property; that nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the court and United States attorney and with the intent to defraud the United States."

ARGUMENT.

I.

THE CIRCUIT COURT EXCEEDED ITS JURISDICTION IN RENDERING THE JUDGMENTS SOUGHT TO BE VACATED AND SET ASIDE.

The court had jurisdiction of the subject-matter and the parties in these suits. The issues to be tried were the amounts of indebtedness of these defendants, sureties upon the bond of a defaulting public officer.

There was no trial, no evidence presented, no submission to a jury, no finding of fact. The defendants, with their attorneys, came into court and offered to consent to judgments for $100 and costs in each case. It appears there was no dispute on the issues. The execution of the bonds, the default of the principal, the amount of the indebtedness, were not denied. The matter upon which the judgments were determined was entirely outside of and foreign to the cases. The defendants stated they were poor men; that they had no property; that nothing could be made out of them, or either of them, or their estates by execution, but if the court would allow a regular and valid judgment to be entered in the cases for these nominal sums they would pay said judgments. This was done, the district attorney not objecting. This was not a legal mode of procedure. The assertion of proof of inability to pay had no relation to the ascertainment of the sum due by virtue of the breach of the condition of the bond. If the district attorney and the defendants and their attorneys had appeared, and it had been agreed upon that $100 was the full amount that

could be recovered in the suits, and the judgment then entered, it *might* be different. That would have been within the issues.

In *Kring* v. *Missouri* (107 U. S., 221, 231) this court said:

> The word "procedure," as a law term, is not well understood. Fortunately, a distinguished writer on criminal law in America has adopted it as the title to a work in two volumes, Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "Sec. 2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice." And in defining practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court, and the course of the court after they are brought in;" and evidence, he says, as part of procedure, "signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted."

These definitions are accepted in the English and American courts. In a late English work—Encyclopedia of the Laws of England—"procedure" is defined as follows:

> This word is commonly opposed to the sum of legal principles which constitute the substance of the law, and denotes the body of rules, whether of practice or of pleading or of evidence, whereby rights are effectuated through the successful application of the proper remedies.

Through these modes of procedure only can jurisdiction be rightfully exercised. A judgment or decree otherwise is void. Even though the judgment or decree be one which the court could make, if these rules are violated in arriving at the determination it can be collaterally assailed. It is a "mere arbitrary edict."

It seems that late cases support these statements. *Munday* v. *Vail* (34 N. J. Law, 418) was an action of ejectment. The defense was based upon a decree of a court of equity. But the New Jersey supreme court decided the decree was a nullity, because it was outside of the issue. Chief Justice Beasley, in delivering the opinion of the court, said:

> Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court can not go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I can not doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by

becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. If in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground—that the parties have been heard, or have had the opportunity of a hearing—that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: "A matter alleged that is neither traversable nor material shall not estop." (Co. Litt., 352 b). And in the

note to the Duchess of Kingston's case, in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments "are conclusive as to nothing which might not have been in question or was not material." For the same doctrine—that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon "the property according to the rights that appear" upon the record—I refer to the authority of Lord Redesdale. (*Gifford* v. *Hort*, 1 Sch. & Lef., 408.) See also *Gore* v. *Stackpole* (1 Dow., 30); *Oldeastle* v. *Stevens* (3 Bligh R., 186). In *Curtis* v. *Price* (12 Ves., 102) Sir William Grant appears in a collateral proceeding to have looked into a decree to see how far it had been warranted by the matters in litigation.

The case which I find most nearly in point is that of *Corwithe* v. *Griffing* (21 Barb., 9). Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, "as the jurisdiction was confined to the subject-matter set forth and described in the petition." In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.

None of these cases are directly in point, but they tend to establish the general proposition that a decree or a judgment can have no force which is not appropriate to any part of the matter in controversy before the court.

These principles were very clearly stated by this court in *Windsor* v. *McVeigh* (93 U. S., 274, 282). That case was ejectment. The plaintiff proved title in himself,

unless his life estate in the premises had been divested by a sale under a decree of condemnation upon proceedings for confiscation, the defendant relying upon the deed executed to him upon such sale. The property was libeled under the confiscation act of 1862, a monition and notice issued, warning all persons interested to appear and answer. The owner appeared by counsel, and filed claim to the property and answer. The district attorney moved that the claim, answer, and appearance be stricken from the files, which motion was allowed, and a decree entered condemning the property, reciting that, the usual proclamation having been made, the default of all persons had been duly entered. The sale was made under this decree. This court decided that this sentence, pronounced against a party without hearing him, was a nullity. Mr. Justice Field, delivering the opinion of the court, uses this language:

> The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, can not be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. (*Norton* v. *Meader*, circuit court for

California.) Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and can not thus transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court can not order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller, to the same purport, in the case of *Ex parte Lange* (18 Wall., 163). So it was held by this court, in *Bigelow* v. *Forrest* (9 Id., 351), that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of a court, having jurisdiction to make the decree, can not be impeached collaterally; but, under the act of Congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction." (Id., 350.)

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornell* v. *Williams*, reported in the 20th of Wallace, is more accurate. "The jurisdiction," says the justice, "having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud." (20 Wall., 250.)

II.

THE DISTRICT ATTORNEY EXCEEDED HIS AUTHORITY IN CONSENTING TO A COMPROMISE OF THE SUIT.

While the authority of an attorney in relation to his client in the conduct of suits is perhaps more extensive than that of an ordinary agent to his principal, yet the principle that he can only act within the scope of his authority remains the same. He may exercise discretion in the control of the cause, make stipulations, waive

technical defects, do all things permitted by the law and usages of the court. He may receive payment, discontinue the suit, submit to arbitration. In all that he does, however, he must have an eye single to the rights and just interests of his client. He is held to strict account for the honorable, diligent, careful discharge of his duty. Therefore there are some things which, although they might appear prudent and advantageous, he can not do without direct authorization. He may not execute any discharge of a debtor but upon the actual payment of the full amount of the debt. He can not release sureties. As was expressed by Pollock, C. B., in *Swinfen* v. *Chelmsford* (2 L. T. N. S., 406): "Although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, and other matters which properly belong to the suit and the management and conduct of the trial, he has not, by virtue of his retainer in the suit, any power over matters which are collateral to it."

This subject was fully discussed by Chief Justice Marshall in *Holker* v. *Parker* (7 Cr., 436). That was a suit in chancery, brought by Holker and others, his assignees, against Parker to set aside an award made under a rule of court in a suit at law in the same court between Holker and Parker. Holker had brought this suit, by way of attachment against Parker, for a very large amount. This action and all demands were referred by rule of court. Subsequently the referees made an award that Holker recover against Parker the sum of $5,000, in full satisfaction and discharge of all debts, costs, judgments, exe-

cutions, accounts, controversies, claims, or demands subsisting between them of what name or nature soever. The accounts between the parties were not examined, nor the judgment of the arbitrators exercised on any part of the case. The award was made with the consent of Parker's attorney, and without objection on the part of Holker's attorney judgment was rendered on the award and the amount paid. The bill was dismissed by the circuit court. That decree was reversed in this court and the cause remanded with directions to set aside the award and judgment and direct an account between the parties. The Chief Justice used this language in delivering the opinion:

> To this court, then, it appears that this award is not the judgment of the arbitrators in the cause, but a compromise between the attorneys, taking the form of an award, and a compromise made at a time when the cause was not so desperate as the attorney supposed it to be. It was a sacrifice of great and important interests at a time when that sacrifice does not appear to have been absolutely necessary. Has the attorney a right to make such a compromise? Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be disclaimed against by all, and to create an impression that the judgment of the attorney had been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized, and being therefore in itself void,

ought not to bind the injured party. Though it may assume the form of an award, or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable, because it is scarcely possible that in such a case the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice; or, if it has not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it.

This reasoning is singularly applicable to the case at bar. We may consider this as a judgment upon a compromise. In fact, there was no compromise. A compromise is a settlement of disputes in which something is yielded and something gained by each party to it. Here the United States obtained nothing but a promise to pay $200. There was no payment, no tender, no security, no attached property. They already had a solemn promise to pay $28,000. Why not take the judgment for $28,000? Why take it for $200 or $100? The defendants said, the judgment is worthless; we are paupers; we have no money, nor property, nor estate; we are execution proof, but if you will wipe out this just debt and merge it in a judgment for a nominal sum we will pay that amount. The promise was but a breath, impotent and worthless. Now, was not this *compromise* so unreasonable in itself as to be exclaimed against by all? Is it not such a compromise, being unauthorized, and therefore in itself void, which ought not to bind the injured party?

It is no answer to this to say that it is no part of the duty of the court, or the party receiving the benefit of a compromise, to examine into the authority of an attorney to consent to it. This proceeds upon the idea that the presumption, arising from his office and character, is that he had such authority. But if he had not, if he acted without, or against, the instructions of his client, that can be shown in a collateral attack and the judgments thus obtained set aside. That was the case of *Hollister* v. *Barker* (*at sup.*), and the same has been held in a long line of cases in this country. *Preston* v. *Hill* (50 Cal., 40); *Smith's Heirs* v. *Dixon* (3 Mete. (Ky.), 138); *Robinson* v. *Murphy* (69 Ala., 543); *Dorweat* v. *Loomer* (21 Conn., 245); *Davidson* v. *Bozier* (23 Mo., 387); *Marbury* v. *Smith* (11 Kans., 562). The question really is, whether the attorney, in consenting to the compromise, acted within his power. It is not whether an absolute presumption of that binds his client. In *Swinfen* v. *Swinfen* (34 Beavan, 549), which was a bill for a specific performance of an agreement for a compromise, the master of the rolls used the following language upon this subject:

> It was pressed very strongly upon me, in argument, that unless this doctrine be supported the business of the court can not proceed, and that it is a matter of the greatest possible importance to place implicit reliance upon the statements of counsel that they are authorized to do particular acts. The expression used by Lord Langdale in the case of *Re Hobler*, which was very strongly insisted upon, is, "The business of the court can not proceed unless credit be given to the statements of counsel that they have authority for what they do." That appears to

be confirmatory, rather than contradictory, of the view I take in this case. There may be certain facts in that case which I do not know, but in that statement I fully concur. The question is undoubtedly one of very considerable importance, for this court has frequently to deal with such matters. Orders are constantly made by the court, upon the consent or nonopposition of the parties, and that not merely in the case of adults and of persons competent to consent, but also in the case of married women and infants, who have no power of consenting at all. It is material for the determination of the question before me, to look at the manner in which the court deals with all these cases. In the case of a married woman, this court will not permit anyone to say for her that she consents, when she has to dispose of property or to waive her right to a settlement; it requires her consent to be given by herself personally, upon what is supposed to be a private examination by the judge, but which usually takes place in open court. That is for the purpose of showing that no undue influence has been exercised on her mind. When the court has to deal with the property of infants it directs a reference, or has the facts before it established by evidence, in order to see that what is proposed to be assented to is for the benefit of the infant, and thereupon it binds the infant by the proceeding. But how does it act when all parties are perfectly competent to consent? Counsel states he consents, and the court no more doubts his authority to make such statement, and that the consent has actually been given, than when he states that he appears as counsel for A B. But if the doctrine which the Attorney-General pressed so strongly were to prevail, viz, that a client would be bound, whether he had consented or refused, it

would be the incumbent duty of the court, in every case, to ascertain that the facts had really been brought before the attention and had received the consent of the client before the order was made. The court gives credit to counsel, and with great justice, for it knows that they act according to their instructions. It gives credit to the instructions given by the solicitors, knowing perfectly well that solicitors act with the most perfect *bona fides*, and never give instructions which they do not consider they are duly authorized to give. Accordingly, it is for this reason, that this court never inquires whether the client has given his consent or authorized the solicitor to give it, the court assumes upon the statement of counsel that the solicitor has so instructed him, and that the solicitor has obtained the consent of his client to the arrangement. If that were not so, if the solicitor, without the authority of his client, could give a consent, depriving a party of a certain portion of his property, how could this court act, with any confidence, without seeing that the solicitor had duly exercised his discretion in the case with regard to adults, as it does with regard to infants.

In the case of infants the judge inquires, because he knows they can not give their consent, but he does not do so in the case of persons who are competent to consent, because he assumes that they have been made acquainted with the facts and that they have authorized the thing to be done. If the case were otherwise, what would be the consequence of the doctrine suggested by the Attorney-General? It would be this: That every prudent man who employed a solicitor to conduct a case for him would give this notice to the opposite side: "You are to understand that my employment of a solicitor does

not authorize him to compromise the suit without my express sanction and authority." But, after that, could the compromise be good, for a great portion of the argument has gone to this extent—that the attorney had a species of authority of which the client could not deprive him, and that he would be bound by acts done under that authority, although done against his desire, and although that desire had been communicated to the other side.

I myself have no doubt whatever, both on principle and authority, that the employment of an attorney does not entitle him to sell the subject-matter of the suit either to a stranger or to the opposing party, without an authority for that purpose; and that so far from its being productive of injurious consequences that he should not possess that authority, I think that the consequences would be to the highest degree injurious if he had it, and that it would seriously impede the administration of justice. For myself, I should, in that case, be indisposed to allow any case of importance to be taken before me by consent, without being satisfied by evidence that the client himself had been communicated with on the subject.

Since I have been upon the bench I have always assumed that the client has been communicated with, and that what is proposed is done with his sanction and knowledge. My opinion is that unless this were so the functions of this court in matters of consent would be paralyzed. It would be too great an abuse of authority for an attorney to say that he has a right to dispose of the property of his client in a particular way, when, if he had communicated to him all the facts, the result would have been different; and yet that the other side are at liberty to say that they are entitled to insist on such an agreement, and that the party is bound by it.

III.

THE DISTRICT ATTORNEY WAS INHIBITED BY LAW FROM CONSENTING TO THESE JUDGMENTS.

The duties of district attorneys are defined by statute (Rev. Stat., secs. 771, 773, 775). Other sections applicable to them are as follows:

> SEC. 362. The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings and of the state and condition of their respective offices in such time and manner as the Attorney-General may direct.
>
> SEC. 377. The Solicitor of the Treasury shall establish such regulations, not inconsistent with law, with the approbation of the Attorney-General, for the observance of district attorneys and marshals respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers and the prompt collection of all revenues and debts due and accruing to the United States.

In accordance with this provision the Solicitor of the Treasury issued instructions to district attorneys and other officers on July 15, 1877, which were duly approved by the Attorney-General, and which are, and ever since have been, in force in the particular mentioned herein.

Paragraphs 6 and 7 of such instructions are as follows:

> 6. When a suit shall have been commenced, either by direction of a public officer or otherwise, it will

be the duty of the United States attorney having such suit in charge to press the same to a judgment at as early a day as possible, consistent with the interest of the United States.

In this connection the attention of United States attorneys is called to the following provision of section 957 of the Revised Statutes:

"When suit is brought by the United States against any revenue officer or other person accountable for public money who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States upon the adjustment of his account, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury and rejected, specifying in the affidavit each particular claim so rejected, and that he can not then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper specified in the affidavit. And no continuance shall be granted except as herein provided."

In all such suits judgment must be demanded, and should be entered at the return term, unless defendants shall have taken all the steps required by this

statute to obtain a continuance. United States attorneys are directed, as far as may be in their power, to see that its provisions are strictly complied with and enforced.

7. Where a cause shall have been continued, he will, in his next return, state upon whose motion and on what grounds the continuance was directed. No attorney will discontinue a suit, or consent to a dismissal thereof, or suspend proceedings, or agree that a judgment or decree shall be taken for a less amount than is claimed by the United States, without express instructions from the Solicitor of the Treasury, unless such attorney shall be of opinion that the suit has been improperly brought, that an error has been committed in the pleadings or proceedings which may be fatal or hazardous to the interests of the Government, or that the evidence in his power to produce is insufficient to support the action, and there shall not be sufficient time to communicate with and receive instructions from the Solicitor of the Treasury; and in all cases of such agreement, consent, discontinuance, suspension, or dismissal, the attorney will immediately report the facts and reasons for his action.

It will not be contended that this case came within the exceptions or any of them. The suit had been pending nearly five years when this action was taken, and was not compromised upon any one of the grounds mentioned in the exception.

Moreover, the whole idea of presumption of authority is dissipated when it is remembered that in all matters of this kind the duties and powers of the district attorney are fixed and limited by express statute and the manner

in which claims may be compromised provided. Section 3469, Rev. Stat., is as follows:

> Upon a report of a district attorney or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the solicitor of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly.

Nothing of this kind was done. No statement of action by the Secretary of the Treasury was made. Manifestly it was made the duty of the defaulting parties to acquaint themselves whether the district attorney had knowledge of a compromise by the Secretary of the Treasury. Manifestly it was the duty of the court to require evidence of this action, if the compromise was to be effectuated by procedure in the court. Without this, any judgment rendered is a nullity.

IV.

THE JUDGMENTS SOUGHT TO BE SET ASIDE WERE OBTAINED BY A FRAUD AND IMPOSITION UPON THE COURT AND THE DISTRICT ATTORNEY.

The fraud, which is relied upon to maintain the bill, was in the statements made by Beebe and Henshaw that they were poor men and without property out of which judgments could be collected; that no part of judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their

estates, by execution; but that if the court would allow a jury and verdict to be entered against them for $100, they, and each of them, would pay said judgment and costs; and that these statements were untrue, and were made to deceive said court and United States attorney, and for the purpose and with the intent to defraud the United States.

It is claimed by defendants that this was not such fraud as would sustain the jurisdiction to set aside the judgments, and that the alleged false statements were not such as to deceive a person of ordinary care.

Taking the allegations of the bill, if the attorney for the Government was guilty of this negligence, that would be no bar to the assertion of the rights of the Government. There may have been a failure upon the part of successive officers to perform their duties—inexcusable delays, inattention, disobedience to instructions. These may have extended to the commencement of the suits and to their prosecution, and may have rendered the result precarious. The transfers of property, the pretenses of insolvency, induced the attorney, evidently, to think it prudent to dispose of the cases in some formal way. No collusion or impure motive is imputed to him. That he erred in the law, in consenting to the judgments, is clear. That he was imposed upon as to the facts, by reason of these false statements, is the fraud charged.

But it is immaterial whether he was guilty of laches or negligence in consenting to the judgments. The doctrine has been uniformly maintained that the Government is not bound by the unauthorized acts of its agents. (*Hunter* v. *United States*, 5 Pet., 173; *Gibbons* v. *United*

States, 8 Wall., 269; *Whiteside* v. *United States*, 93 U. S., 247; *Hart* v. *United States*, 95 U. S., 316; *Moffat* v. *United States*, 112 U. S., 24.)

So that the question of fault or negligence on the part of the attorney of the United States is not to be considered. The suits were against these defendants as securities on an official bond, given for the protection of the public. No careless or intentional wrongful act of one of the Government's agents could affect its rights. (*Ryan* v. *United States*, 86 U. S., 514; *Osborne* v. *United States*, ib., 577; *Whiteside* v. *United States*, 93 U. S., 247.)

It is strenuously urged that the acts complained of are such as will not authorize a court of equity to set aside the judgments on account of fraud; and *United States* v. *Throckmorton* (98 U. S., 61) is confidently relied upon to support this contention. A proper reading of that case brings this complainant within the doctrine laid down therein, not without it. There is no occasion to explain it. Says Mr. Justice Miller, delivering the opinion:

> But there is an admitted exception to the general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent

a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there never has been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sec. 499; *Pearce* v. *Olney*, 20 Conn., 544; *Wierich* v. *De Zoya*, 7 Ill., 385; *Kent* v. *Ricards*, 3 Md., ch. 392; *Smith* v. *Lowry*, 1 Johns, ch. 320; *De Louis et al.* v. *Meek et al.*, 2 Iowa, 55.

In all of these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

And afterwards (p. 68), the learned judge lays down a rule which is relied on by opposing counsel here:

> The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

This was said in a case where the bill was brought to set aside a confirmation of a claim under a Mexican grant, upon the ground that the grant or concession introduced to support the claim was false and fraudulent and supported by the depositions of perjured witnesses, the bill being brought twenty years after the decision of the only controverted thing in the original decree.

The same doctrine was laid down in *Vance* v. *Burbank* (101 U. S., 514). And this court, in *Moffat* v. *United States* (112 ib., 24, 32), speaking of these cases, said:

> It was held in those cases that the fraud which will justify the setting aside of the judgment of a tribunal specially appointed to determine particular facts must be such as prevented the unsuccessful party from fully presenting his case, or which operated as an imposition upon the jurisdiction of the tribunal.

There was no adversary trial or decision of the cases against Beebe and Henshaw. The fraud was in the prevention of said inquiry, and was therefore extrinsic and collateral to the matter to be tried. By that fraud the United States was deprived of its proper judgment.

Suppose the terms of this transaction, which we have treated as a compromise, had not been carried out, would a court of equity not set aside the judgments as being absolutely void? And the terms were not carried out. If there was authority to submit to these judgments, it could only have been by their payment. But they were not paid. Then comes the extraordinary contention that, fifteen months after their rendition, Beebe appeared at the Treasury and satisfied one of the judgments, and, the two judgments being for the same debt, that was a satisfaction of the whole claim and demand of the Government, and Henshaw pays nothing and sets up this defense to the bill. Was that the object in having the records show a trial and verdict, and judgment on the verdict, when there was no trial or verdict? Subsequent conduct does sometimes show motives culminating in

fraud. The disavowal of the obligations of this compromise strongly tend to prove unfairness and disingenuousness in the concoction of these judgments. Place us in the position where the judgment entered will be an estoppel upon the United States from ever again making this claim, and each of us will give you $100. This was what the defendants, in effect, said; and their subsequent acts prove this to have been a deceit. They were bound to take notice of the want of authority on the part of the district attorney to compromise their claims, and that the Secretary of the Treasury was the only officer who had that power. The scheme by which the judgment roll is made to show regularity was an imposition upon the court and a fraud upon the Government. The attorneys may all have acted, though mistakenly, innocently and inadvertently. If the statements of the bill are true, none the less was a fraud perpetrated which should nullify the judgments.

V.

THE BILL, AS AMENDED, IS NOT MULTIFARIOUS IN THAT IT MAKES A NEW CASE, NOR IS THERE FATAL MISJOINDER OF PARTIES.

The theory on which the demurrers on the first ground are based is that Henshaw and Henshaw's heirs were strangers to the claim and judgment against Beebe, of the United States in the matter of Duston's bond, on which Beebe was security. This is true, but the demurrers must fall when it is remembered that the conveyance to Henshaw of Beebe's interest in the property described

in the assignment (pp. 22, 23, 24, and 25 of the record) are alleged to have been without consideration and was fraudulent and void as to complainant. Further, the bill avers and the assignment shows that Henshaw was, after selling such parts of the property conveyed as might be necessary to pay the debts of the firm of Henshaw & Beebe, to reconvey the balance to Beebe. And the bill further shows that none of the estate conveyed has been used for the purposes named in the deed, and is subject to Beebe's debts, including the Government's claim, on the Duston judgment against Beebe. There was absolutely no change made in the character of the bill by the filing of the amendment. It merely seeks to add another amount due to the Government and payable out of the same property sought to be subjected. (See *Tilton* v. *Cofield*, 93 U. S., 136; *Hunter* v. *United States*, 5 Peters, 173; *Walden* v. *Bodley*, 14 Peters, 156.)

The objection of multifariousness usually raises merely a question of convenience in conducting the suit, and calls for the decision of the court simply upon the question whether, in the discretion, the various causes set forth in the bill should be tried in a single suit, or should be divided and tried in two or more suits. (Story, Equity Pl., sec. 271, *note* (a). And although this bill might be "open to objection for multifariousness, because it contains two distinct subject-matters wholly disconnected with each other, yet if one of them be clearly without the jurisdiction of a court of equity for redress, it seems that the court will treat the bill as if it were single, and proceed with the other matter over which it has jurisdiction as if

it constituted the sole object of the bill." (Story, Equity Pl., sec. 283.)

The prayer of this bill does not include relief against the judgment on Dustan's bond. That matter may be treated as surplusage and disregarded.

This bill is not subject to the objection of misjoinder. Henshaw and his heirs held the property for the purposes named, and held it in trust for Beebe and his creditors, of which the complainant is one. In cases of this kind it makes no difference how many grantees there may be of the fraudulent debtor, nor how disconnected their titles. All may be joined by the defrauded creditor in one bill, and so in all similar cases.

We deem it scarcely necessary to advert to the objection for want of tender of the amount paid on the Beebe judgment. There is no pretense that Beebe did not owe this to the United States. The money was paid and covered into the Treasury. Only an appropriation by Congress could take it out. No officer of the Government could pay or tender it. But, in any event, there is no application of *in statu quo* here.

Respectfully submitted.

ROBERT A. HOWARD,
United States Special Assistant Attorney.

W. S. REESE, Jr.,
United States Attorney, Middle District of Alabama.

JOHN K. RICHARDS,
Solicitor-General.

O

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 71.

THE UNITED STATES OF AMERICA, APPELLANT.

vs.

EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL,

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the Circuit Court of Appeals for the fifth circuit, affirming a decree of the Circuit Court of the United States for the Middle District of Alabama, which sustained demurrers by appellees to the bill of complaint herein and dismissed the bill.

The bill which was filed in March, 1890, presents the following facts:

In June, 1873, Eugene Beebe and Ferrie Henshaw became the sureties on the official bond of Francis Widmer, as Collector of Internal Revenue for the Second District of Alabama. Penalty of the bond was

$50,000.00, and was payable and conditioned as by law required. Widmer did not faithfully perform the duties of his office, in that he failed and refused to pay over to the Government the sum of $28,158.56, public money, which had come into his possession as such Collector. This sum has never been paid to the United States. At the time of the execution of this bond, and for many years thereafter, Beebe and Henshaw owned a large quantity of real estate, which is specifically set out in the bill. That Henshaw died in April, 1879, leaving as his heirs at law, the numerous parties mentioned in section 3 of the bill, page 4 of Record. The bill further states that Eugene Beebe, Ferrie Henshaw and the estate of Henshaw were, on the date of the filing of the bill, and have been uninterruptedly since and prior to the year 1873, "owners of all the property hereinabove described, which is of the value of $50,000.00." See section 3, page 4 of record. That in June, 1879, one Hatchett was appointed Administrator of the estate of Henshaw, and in April, 1880, reported the estate as insolvent to the Probate Court of Montgomery county. In July, 1880, that Court declared the estate insolvent. Hatchett was removed as Administrator in December, 1882, and one Bellinger was appointed his successor in office. Bellinger resigned the office as Administrator in November, 1883, and nothing whatever has been done in the Probate Court in the matter of this estate.

The estate remains wholly unsettled, and its assets were and are, insufficient to pay the debts of said estate. See sec. 4, p. 5 of Record. Eugene Beebe was insolvent, and his estate is also insolvent and unable to pay his debts, including the claim of $28,158.56, the subject matter in this suit. It is shown by the Bill of Revivor against the heirs at law of Beebe; that he died in 1894. Page 49 of Record. W. R. Waller was appointed Adminis-

trator of Beebe's estate, and filed demurrers to bill as amended. Page 54 of Record.

It is further shown that in June, 1880, see section 7, page 5 of record, *separate* suits at law were begun in the Circuit Courts of the United States at Montgomery, Alabama, against said Beebe, and against William T. Hatchett, as Administrator of Henshaw's estate, on Widmer's said bond, to recover the amount of the Collector's default. These suits were continued from time to time at the request of said Defendants, until February 6th, 1885, see section 7, page 5 of record, when judgments were *severally* entered in said Court against said Hatchett, as Administrator of Henshaw, and against said Beebe for $100,000 and costs. Beebe, on the 1st of July, 1886, see section 7, page 5 of record, paid into the treasury of the United States one hundred and nine and eighty-five one-hundredths dollars ($109.85) against him; but the judgment against Hatchett, as Administrator of Henshaw, has *never* been paid.

The judgments were obtained under the following circumstances: The Defendants in open court stated that Beebe and Henshaw were poor men. That Beebe's and Henshaw's estate had no property out of which the Government could make the claim against them. They represented that if the Court would allow a jury and verdict against them for one hundred dollars ($100.00), *each* of them would pay such judgment and costs. No evidence of any kind was introduced in these cases, or either of them. See section 7, page 5 of record.

The indebtedness of said Beebe, and the estate of Henshaw to the Government was $28,158.56 as on account of said Widmer's bond. No hearing on the law or facts of the case were ever had. On Beebe and Hatchett making the statements aforesaid, the presiding judge of the Court remarked that unless the District Attorney for the United

States objected, the case might be disposed of as suggested. The District Attorney did *not* object, and the judgments were entered in *each* of these cases as suggested by the Defendants. The bill avers, sec. 7, page 6 of the record, that the statements made by the Defendants as to solvency, were wholly untrue, and were made to deceive the Court and the United States Attorney, and for the purpose and with the intent to defraud the United States.

It is charged that the District Attorney had no authority to accept the statements of the Defendants, which were unsworn. That the act of the District Attorney was a mere naked compromise of the said large claim of the Government, which neither the District Attorney nor the said Circuit Court had any authority to make, but were inhibited by the law to make, entertain and consummate; that said court was without jurisdiction to determine said cases in the manner in which it was done, and that the judgments as rendered were void *ab initio*, and should be treated as in a Court of Equity.

The bill goes on to aver, that the various other defendants named, assert some claim to the real estate named in the bill, but the nature and extent of the claims is not known to Complainant. It shows that Beebe had conveyed, or attempted to convey it to Henshaw on the 22d day of March, 1877.—See section 11, page 7 of the Record. See deed marked exhibit "B" of the bill, pages 12, 13, and 14 of the Record—but avers that this deed was without consideration, made to hinder, delay and defraud existing creditors and was null and void, and that all attempted conveyances of the land in question was made in subordination to the complainants claim against Beebe and Henshaw. On the 5th day of January, the bill was amended—Record pages 28, 29

and 30, by setting up an additional claim on Appellants against Beebe as follows:

In January, 1872, Beebe became the surety on the official bond of one Dustan as Deputy Postmaster at Demopolis, Alabama, the bond was in the amount of $12,000 and was payable and conditioned as prescribed by law. That Dustan made default to the Government in the sum of $441.49. That a judgment against Beebe on this bond was rendered in the United States Circuit Court aforesaid, December 26th, 1878, for $579.45 together with costs, which amounted to $53.82, and that this amount is still due and unpaid. See page 29 of record.

The following averment was also added to the bill by the amendment, viz:—That Henshaw, as assignee of Beebe, under the said deed marked exhibit "B," and the heirs of Henshaw had paid various debts of Beebe and had failed to pay the debts evidenced by the judgment on the Dustan's bond, which was a prior claim under such assignment or deed, which it will be observed on inspection, provided for the payment by Henshaw of certain debts of Beebe's, and, after this was done, the real estate was to be reconveyed to Beebe, his heirs or assigns. The prayer of the bill (Record pages 8 and 9) is that the said judgment for $100.00 each against Beebe and Henshaw's Administrator be set aside and vacated; that the administration of Henshaw's estate be removed into and settled in the United States Circuit Court; that an account be stated between the parties before a Master, to ascertain the amount due to the United States on account of the liability of Beebe and Henshaw on the said bond of Widmer as Collector; to ascertain and report upon the claims, liens or encumbrances, if any, upon the said property; and that on the coming in of the report the said sum found due to the Government be held a prior lien and

charge on the said real estate; that all conveyances and assignments of said property in conflict with said lien of the United States be set aside and held for naught, and that the property be sold by the Master, for the payment of said indebtedness, free of all incumbrances, and the proceeds of the sale, after satisfying the Appellant's claim, be distributed amongst those who are found entitled thereto. There was a prayer for an injunction and receiver of the property *pendente lite.*

All the parties appeared and filed numerous demurrers to the bill as originally filed and as amended. Without undertaking to set out all these demurrers, it may be stated that, avoiding the needless repetition adopted by counsel for appellees, the grounds of objection to the original bill raised by them, are as follows:

1st. The bill is without equity.

2nd. That the bill shows that the Government's claim has been finally adjusted in a Court of competent jurisdiction, viz: the Circuit Court of the United States for the Middle District of Alabama, and no sufficient grounds are alleged for setting aside the judgment.

3rd. That the bill is multifarious in this, that it unites separate and distinct parties, claiming separate and distinct interests in the property sought to be to the subject payment of the Government's claims.

4th. That the bill is multifarious in that it joins Beebe, his heirs, and estate; the claimants of the property and the heirs of Henshaw, without showing that the claim against Henshaw and Beebe was a joint claim.

5th. That the bill shows that the judgments against Beebe and Henshaw in favor of the Government were rendered by and with the consent of the U. S. Attorney, and fails to show that such consent was obtained by any

fraud practiced on the District Attorney by Beebe or the representative of Henshaw, or through any accident or mistake without fault or negligence on the part of the District Attorney.

The grounds of demurrers assigned to the bill as amended in addition to those set up in the demurrers to the bill as originally filed, which are re-"assigned to" the amended bill, are as follows:

1st. That the amended bill makes a new case.

2d. That it is multifarious in that the subject matter of the original and amended bills are disconnected.

3d. That as to the judgment against Beebe on the Dustan bond, the amended bill does not show that Henshaw or his heirs had any notice of the Government's claim evidenced by said judgment, or that, having such notice he or they made any payment on Beebe's debts in derogation of the Government rights. Such, in brief are the facts and pleadings in this case, and the same being agreed and submitted on the 29th day of May, 1897, the United States Circuit Court rendered its decree sustaining all the demurrers to the bill, as amended, and dismissing the same out of the Court—Pages 46 and 47 of the Record, and on appeal this demurrer was affirmed by the Circuit Court of Appeals.—Record, page 65. From which said decree of affirmance this appeal is taken.

ASSIGNMENT OF ERRORS.

The following assignment of errors was filed in the Circuit Court of Appeals. (Record, pages 61 and 62.)

1. The said circuit court of appeals erred in affirming the decree in said cause of the circuit court of the United States for the middle district of Alabama sus-

taining the demurrers filed by the appellees and dismissing the bill of complaint of the United States.

2. Said circuit court of appeals erred in reversing the decree in said cause of the circuit court of the United States for the middle district of Alabama.

3. Said circuit court of appeals erred in not maintaining the bill filed by the United States in said cause and in not remanding the said cause to the circuit court of the United States for the middle district of Alabama for further proceedings under said bill.

4. Said circuit court of appeals erred in holding that "The alleged false statements in the suit brought by the United States on the bond in question were not such as to deceive a person of ordinary care."

5. Said circuit court of appeals erred in holding that said statements "could not have deceived the district attorney who represented the Government; either as to the amount due on the bond or as to the property owned by the defendants."

6. The said circuit court of appeals erred in holding that said statements "did not in any way prevent the Government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so."

7. Said circuit court of appeals erred in holding in effect that the rights of the United States were affected by the acceptance by the officers of the Treasury Department of the sum of one hundred dollars, with interest, from Beebe, one of the defendants, in satisfaction of one of the judgments sought to be set aside.

8. Said circuit court of appeals erred in holding that "The facts of the case bring it under the well-known rule announced in U. S. vs. Throckmorton (98 U. S.,61) and the cases following it."

9. The said circuit court of appeals erred in not holding that the judgments against which the bill in this

case is directed and which are sought to be set aside were in fact and effect illegal attempts to compromise claims and rights of, and amounts due to, the United States, and therefore void and of no effect.

10. The said circuit court of appeals erred in not holding that neither the officers of the Treasury Department nor the attorney nor any other officer cannot, directly or indirectly, compromise a claim of the United States, except in the manner and form provided by law, and that compromises of claims due to the United States have no validity, force, or effect, even though made through and by means of a judgment obtained for that purpose, unless the special requirements of the law upon the subject have also been followed and complied with.

11. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were obtained by the fraud and misrepresentation of Beebe, one of the defendants, and of the personal representative of Henshaw, another of the defendants, and that said judgments are void.

12. Said circuit court of appeals erred in not holding that the said judgments against which the bill in this case is directed, and which are sought to be set aside, were in fact and effect nothing more than unauthorized, illegal, null, and void attempts to compromise the claim of the United States against the defendants Beebe and Henshaw of over twenty-eight thousand dollars for the sum of two hundred dollars.

13. That said circuit court of appeals erred in holding that this is a suit to set aside and annul the judgment of a court regularly entered, in a matter on which it had jurisdiction on the ground only "that the said defendants Beebe and Henshaw stated to the court that they were poor men and were without property; that

nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the court and United States attorney, and with the intent to defraud the United States."

ARGUMENT.

From a mere cursory reading of these proceedings, the Court will see that the *first* and *crucial* question in this case is: "Were the judgments against Eugene Beebe and Ferrie Henshaw rendered under the circumstances set out in the bill as originally filed,—paragraph 7, pages 5 and 6 of the Record—and in the amended bill—pages 28, 29, 30—of the Record void, as having been mere unauthorized compromises of the Government's claim against Beebe and Henshaw for over $28,000.00 for $200.00, and one obtained by the fraud and misrepresentation of Beebe and Henshaw's personal representative. This involves, of course, the power of an attorney to compromise a client's claim, whether there is any difference in the relation of a District Attorney to the Government and that of any other attorney to his client, and whether the concurrence of the United States Circuit Court in the compromise in permitting the judgment to be rendered, added anything of binding force to the compromise.

2d. Has the Government been *estopped* by any authorized action in the premises.

3d. Whether under the circumstances of the case there is a misjoinder of parties, and

4th. Is the bill as amended multifarious as to the subject matter, and does it, therefore, present a new case?

We are unaware of any statute of the United States which vests in the District Attorneys any power to com-

promise claims due the Government. If, in this respect, United States Attorneys have any power equal to or superior to the attorneys of private persons, employed to prosecute to effect and collect debts due their clients, it has not been called to our attention, and has escaped our research.

The power of an attorney is not co-equal or co-extensive with that of his client. He is a special agent, limited in duty and authority to the vigilant prosecution or defense of the rights of the client. He may enter into no bargains or contracts in reference to his client's rights as contra-distinguished from mere agreements as to the conduct of the suit, which will bind the client, unless he has been specially authorized, or his acts have been ratified by his employer.

Hooker als. vs. Parker, 7 Cranch., 436.
Robinson vs. Murphy, 69 Ala. 543.
Hall Safe and Lock Co. vs. Harwell, 88 Ala. 44.
Dewort vs. Loomer, 21 Conn. 245.
Vail vs. Conont, 15 Vt. 314.
Dout vs. Barnes, 1 Md. ch. 127.
Smith vs. Dixon, 3 Metcalf 438.
Smock vs. Dode, 5 Rand, (Va.) 639.
Marbury vs. Smith, 11 Kans. 562.

An attorney-at-law has authority, by virtue of his employment as such, to do in behalf of his clients all acts, in or out of court, necessary or incidental to the prosecution or management of the suit, and which affects the remedy only and not the cause of action.

We chiefly rely in this case upon the proposition as set forth in our 13th assignment of error (see record, p. 62.) and take issue with the learned judge, who in ren-

dering the opinion of the Circuit Court of Appeals below stated, "It is evident that this is a suit to vacate, annul and set aside the judgment of a court regularly entered in a matter of which it had jurisdiction," etc. We contend that there never was a judgment regularly entered, that the United States Circuit Court at Montgomery, Alabama, which originally heard said cause and the United States attorney who represented the Government in said trial, had no authority in law to accept statements and representations which were not made under oath, nor supported nor verified by evidence or proofs, and thus bind the Government, for the Court was without jurisdiction to render the judgment in question upon the facts as stated in the bill, and therefore, if this be true, it was nothing but a compromise of the Government's claim of twenty-eight thousand, one hundred and fifty-eight dollars and fifty-six cents ($28,158.56) by the United States attorney. We draw the attention of the court particularly to the manner in which the *separate* judgments of one hundred dollars each were rendered in the United States Circuit Court, that on February 6th, 1885, when judgment was obtained there was no jury in attendance in said Court, (see record, pages 29 and 30) that no witnesses were sworn or examined in behalf of the Government, that no witnesses were sworn in the interest of the defendants below, but "that said defendants came into Court and stated and represented" etc., (see Record pages 5 and 6), and that upon these uncontradicted facts, by appellees in this appeal, and with no other evidence or proof being introduced, or evidence being passed upon by a jury, and *no objection being made* by the *United States Attorney*, the claim of the Government amounting to twenty-eight thousand, one hundred and fifty-eight dollars and fifty-six cents

($28,158.56) was merged into a judgment *separately* entered "against them for one hundred dollars, they and *each* of them would pay said judgment and costs." (See Record page 6).

(*a*) We claim that upon the facts, as stated in the bill and uncontradicted there never has been a judgment rendered in this case by the United States Circuit Court.

(*b*) We contend taking the authority as quoted by counsel for all appellees, except the Henshaw heirs, viz: Robinson vs. Murphy, 69 Ala., 547; that there has been no valid judgment in this case for "an attorney-at-law is a special agent limited in duty and authority to the vigilent prosecutions or defense of the rights of his client. His authority to enter into bargains or contracts binding on his client, *unless expressly conferred* is confined within the limits of that professional action, which may be necessary for the conduct of the proceedings in the course of pending writs." How much more circumscribed and limited are the powers of an United States Attorney in the management of his client's interest, his authority being regulated and limited by statute, beyond which he has no authority to bind the United States Government.

We hold that the case of Holker vs. Parker, 7 Cranch, 436; is directly in point in this case, and that there really was less reason for setting aside the compromise in that case than in this because the authority of the attorney of a private individual is much greater than that of an United States Attorney.

(*c*) The argument adopted by counsel in brief for Henshaw's heirs, upon the question of the *verity* of the judgment roll, is that as the Government's contention is based upon the idea that the District Attorney "was remiss in the discharge of his official duties," and there-

fore the judgment should be set aside, in this, the learned counsel errs. The Government contends that as the Court and United States Attorney had no legal authority to act as they did in this case, and consequently no judgment being had, it is immaterial in the matter at bar whether the United States Attorney was remiss or not. The statutes of the United States provides the manner that compromises shall be effected with the Government, that there is no authority to compromise a demand which is in suit, except upon the satisfactory conclusion that the amount conceded is the correct amount of indebtedness, and this not being one of them it has no effect in law or equity and is not binding on the United States Government.

Revised Statutes, sec. 236.

Independently of the lack of power in the legal representative of the Government to compromise this claim, it is specially alleged in the bill, that his consent to the rendition of these judgments—absurdly disproportionate in amount to the claims of the United States against Beebe & Henshaw's estate—was obtained by fraud. Not mere general allegations of fraud, but by the specific statements of a false and fraudulent character, set out in paragraph 7, page 6 of the Record. Of course, on demurrer, these allegations *must* be taken as true.

The cases of Holker et al. vs. Parker, 7 Cranch and others, especially the former, clearly demonstrates that the decree of the Circuit Court should be reversed, if the opinion in the cases cited is law. Certainly the law as announced in the case in 7 Cranch, by Chief Justice Marshall has not been questioned. There the appellant's former attorney had, by misrepresentation of appellee, been induced to take a decree or award on arbitration for a much smaller amount than was actually due. He

had no more than the ordinary power of attorney to sue for and collect a claim due his client.

Justice Marshall, stating as a broad proposition of law that an attorney has no right to compromise his client's claims without express authority—held that the deception practiced on him by the appellee was sufficient of itself to vacate the judgments. And what was that deception? Exactly the same as practiced here on the U. S. District Attorney to obtain these judgments and thereby the release of their large liability, by Beebe and the Administrator of Henshaw, viz: that Beebe himself and Henshaw's estate were insolvent. Statements, which, in the case cited, and the case at bar were false, for here it is alleged that at the time of the said representation, said parties were in the possession of the valuable real estate mentioned aggregating in value $50,000.00—Paragraph 3, page 4 of Record. We forbear further comment, but request the Court's attention to all the authorities cited, and particularly the case in 7 Cranch.

Laches not chargeable to the Government, and further, there is no authority in any officer of the Government to make a tender.

Answering the argument of the counsel for the appellees upon the proposition that there is no equity in the bill, because there has never been an offer to return the amount collected upon the Beebe judgment nor offer to credit the judgment collected upon the debt.

We say:

(a) That laches are not imputable to the Government.

United States vs. Kirkpatrick, 9 Wheat, 199.
Dol vs. Postmaster General, 1 Peters, 318.
Gourman vs. United States, 97 U. S., 584.

(b) That there is no authority in any officer of the Government to make a tender.

(c) That it was not necessary to offer to credit the money collected under the Beebe judgment on the original debt, this was done by operation of law, and that the Government has a right to receive a partial pay ment on the debt of a defaulting officer and not be thereby *estopped* from proceeding in a proper manner to collect balance of debt.

Fire Ins. Co. vs. Wickham, 141 U. S., 564.

It is a reasonably well settled rule, that, unless the agreement to accept in satisfaction of an *ascertained* debt a sum less than the amount due, be founded on some *additional consideration*, the creditor is not precluded from recovering the rest of his claim. Even where the creditor gives a receipt in full upon payment of a portion of an undisputed account, he is not concluded thereby from recovering the balance, *although the receipt was given with knowledge and there was no error or fraud.*

Ryan vs. Ward, 48 N. Y., 204,
Harriman vs. Harriman, 12 Gray, 341,
Miller vs. Coster, 66 N. Y., 609,
Evans vs. Ponis, 1 Exch., 601,
Cooper vs. Parker, 14 C. B., 118,
Warren vs. Skinner, 20 Conn., 557.

The case chiefly relied on by counsel for appellees and the only one cited by the circuit court of appeals in affirming this case below; viz: U. S. vs. Throckmorton, 98 U. S., 61, has absolutely no bearing upon this case, for the reason that the *very thing* tried in the court below in that case; viz, whether the *grant or con-*

cession was false and fraudulent and whether the depositions were those of perjured witnesses or not, while upon the matters in the suits at law against said Beebe and Henshaw in the Circuit Court of the United States at Montgomery, Alabama, there was never any trial and it is on that very account that the bill in this case was filed and that we are here on appeal.

Appellees were chargeable with the law that required this claim to be settled by the Treasury Department.

Revised Statute, Section 236,
Revised Statute, Section 3469.
Paragraph 7 of instructions to District Attorneys issued by Solictor of the Treasury, July 15, 1877.

MULTIFARIOUS.

3d. The bill as amended is not multifarious in that it makes a new case. The theory on which the demurrers on this ground are based is that Henshaw and Henshaw's heirs were strangers to the claim and judgment against Beebe, of the United States in the matter of Dustan's bond, on which Beebe was security. This is true, but the demurrers must fall when it is remembered that the conveyance to Henshaw of Beebe's interest in the property described in the assignment—pages 12 and 13 of the Record, are alleged to have been without consideration and was fraudulent and void as to complainant. Further, the bill avers and the assignment shows that Henshaw was, after selling such parts of the

property conveyed as might be necessary to pay the debts of the firm of Henshaw & Beebe, to re-convey the balance to Beebe. And the bill further shows that none of the estate conveyed has been used for the purposes named in the deed, and is subject to Beebe's debts including the Government's claim on the Dustan judgment against Beebe. There was absolutely no change made in the character of the bill by the filing of the amendment. It merely seeks to add another amount due to the Government and payable out of the same property sought to be subjected.

See

Tilton vs. Cofield, 93 U. S. p. 136.
Hunter vs. United States, 5 Peters, 173.
Walden vs. Bodley, 14 Peters, 156.

MISJOINDER.

4th. This bill is not subject to the objection of misjoinder. Henshaw and his heirs held the property for the purposes named, and held it in trust for Beebe and his creditors of which the complainant is one. In cases of this kind it makes no difference how many grantees there may be of the fraudulent debtor, nor how disconnected their titles. All may be joined by the defrauded creditor in one bill, and so in all similar cases.

Gaines vs. Chew, 2 Howard 619.
Shields vs. Thomas, 18 Howard 253.
Heids vs. Heids, 80 Ala. 225.
Russell vs. Garrett, 75 Ala. 350.

Halstead vs. Shepard, 23 Ala. 538.
Handley et al. vs. Heflin, 84 Ala. 600.
Fellows vs. Fellows, 15 American Dec. 428.

Respectfully submitted,
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United States Attorney
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W. S. Reese.
for appellant.

No. 310.

Brief of Gunter for Appellees.

Supreme Court U. S.
FILED
FEB 26 1900
JAMES H. McKENNEY,
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Supreme Court of the United States,

October Term, 1899.

No. 310.

THE UNITED STATES, APPELLANT,

vs.

EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL.

Appeal from the U. S. C. C. of Appeals for the Fifth District.

Argument of W. A. Gunter, for the Henshaw heirs, Appellees in said cause.

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STATEMENT OF THE CASE AGAINST THE HENSHAWS.

The bill alleges that in 1873 one Widmer gave a bond as collector of revenue, with Ferrie Henshaw and one Beebe as sureties – that Widmer made default to amount of $28,158.56, due with interest from July 1st, 1874, and that afterwards said Widmer died.

That Beebee & Henshaw were partners and owned certain real property, which is described.

That Henshaw died in 1879 intestate, leaving as heirs the parties made defendant as such heirs.

That one W. T. Hatchett, qualified as administrator of Henshaw, and reported the estate insolvent to the proper State Court, showing claims to amount of $54,000.00, including the indebtedness to the United States on said bond. That the estate was duly declared insolvent. (R. 5)

That Hatchett was succeeded in 1882 by one Bellinger, as administrator, and that Bellinger resigned and that there has been no further administration of said estate.

That Beebe & Henshaw from 2 July, 1880, have been insolvent (R. 5) and that by reason of such insolvency, the complainant is entitled to priority.

That on 3d June, 1880. separate suits at law were commenced in the U. S. Circuit Court at Montgomery against said Beebe, and said Hatchett as administrator of Henshaw, for the recovery of the sum due upon said bond for said default; that on February 6th, 1885, judgments were severally entered in said court against each for $100.00 and costs—and that Beebe paid the judgment against him in July, 1886; but that the judgment against Hatchett remains unpaid "and is due and unpaid to the United States." (R. 5)

The said judgments were entered under the following circumstances:

"Said defendants came into court and stated and represented in open court and they caused to be stated and represented for them, that said Beebe and said Ferrie Henshaw were poor men; and that said Beebe and that estate of said Ferrie Henshaw, were without property out of which said judgments could be paid and collected;

that no part of said judgments could be collected by any process of law; that nothing could be made out of them or either of them, or their estates, by execution; but if the court would allow a jury and verdict to be entered against them for $100.00, they and each of them, would pay said judgment and costs;" that no evidence or proof was or had been introduced, and the statements aforesaid only were before the court, and no hearing or determination upon the law or facts was had.

That the court remarked, that unless the district attorney objected, the causes might be disposed of as suggested; that the District Attorney did not object; and said judgments were accordingly entered.

That said statements were untrue and made to deceive said court and United States District Attorney and to defraud the United States. That the District Attorney and the court had no authority to accept said statements and representations, and that the court was without authority to render said judgments under the circumstances, and that they are null and void and should be vacated. (R. 5 & 6).

That in 1877, said Beebe conveyed to Henshaw, his partner, his interest in said property for the alleged purpose of securing certain pretended liabilities of Beebe to Henshaw, and to protect the creditors of the firm; a copy of which is attached as Exhibit B. That this deed was without consideration and fraudulent; that none of the property was sold, and that a final settlement had been made between Beebe and Henshaw, whereby the former was entitled to a re-conveyance, but if not, that said property is liable for the said debt to the United States. R. 7 & 12.

After making parties, the bill prays that said judg-

ments be vacated, that an account be taken of the original debt, and of the claims and liens on said property, and that the amount due the United States be declared a first lien, and the property sold for the payment thereof. Record, 8–9.

The heirs of Henshaw demurred to this bill. Record, 37.

The demurrer was sustained November 6, 1890. Record, 39.

Thereupon, complainant amended the bill.—This amendment is on page 28-9 of the record—the order allowing it on page 40.

The amendment first alleges the execution of another official bond in which Beebe alone, and not Henshaw, was surety, and the recovery of a judgment in 1878 for $579.45 and costs against him in the same court, which was still due and unpaid—an execution thereon having been dnly returned "no property." The amendment then alleges, though the judgment entry and records of said court show that the judgments on the Widmer bond, mentioned in the original bill, were regularly had upon a jury and verdict, that in fact, no jury was then in attendance in said court nor any such verdicts actually rendered; that the jurors had been finally discharged, to-wit, on the 4th February, two days before said judgments were rendered. That orator discovered this fact since the filing of this bill from the examination of the records of said court and of some persons who served as jurors, and of the original papers which do not show the verdict of any jury.

The 11th paragraph of the bill is amended to aver, thot "Henshaw as such assignee, and the heirs of said Henshaw, have paid indebtedness due by said Beebe,

before having satisfied and paid the debt aforesaid due to the United States, to-wit, amongst others, a debt due by said Beebe to Mrs. Sarah S. Watson and J. Curry Watson, amounting to about fifteen thousand dollars." There is no prayer to the amendment. R. 28–29–30.

After the allowance of this amendment, the Henshaws demurred to the bill as amended, assigning the original grounds assigned and other grounds, shown on page 45 of the record.

The cause came on further to be heard, and the demurrers were again sustained and the bill dismissed. Record 46.

The case was then taken to the U. S. Circuit Court of Appeals for the Fifth Circuit, where there was an affirmance.

LAW POINTS.

1. Justice knows no parties, and the same rules are applicaple to all suitors alike. So that when the United States sues or is sued—as also when it contracts or is contracted with—its position of sovereignty gives it no exemption whatever from any of the rules, except the strict statute of limitations, which pertain to common people in such cases. The rule is, that "when the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants."

U. S. v. Throckmorton, 98 U. S., 61;
Smoot's case, 15 Wall., 36-45;
Chicago, etc. v. U. S., 104 U. S., p. 685;
Mitchell v. U. S., 9 Pet., 711;
The Siren, 7 Wall., 159; . . .
U. S. v. Beebe, 17 Fed. Rep., 36.

2. While it is true that the United States is not bound by the statute of limitations, as an individual would be, still when a bill is brought after a considerable lapse of time, and after the death of all the parties concerned, seeking to annul judgments surrounded by every presumption which should give them support, it should "present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest."

U. S. v. Throckmorton, 98 U. S., p. 64;
United States v. Des Moines & Co., 142 U. S., p. 540–1.
U. S. v. Beebe, 17 Fed. Rep., 36.

3. The frauds for which a bill to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, whereby the unsuccessful party has been without fault or negligence prevented from exhibiting fully his case.

U. S. v. Throckmorton, 98 U. S., 61;
Pico v. Cohn (91 Cal., 25 A. S. Rep., 159;
McDowell v. Morrell, 5 Lea (Tenn.) 278.

"Public policy requires a rule fixing a line beyond which no further litigation can take place."

ib.
Freeman's notes, 25 A. S. Rep., p. 168.

4. "The particulars of fraud must be alleged; it will not be presumed from loose untraversable allegations of fraud in general."

Marquez v. Frisbee, 101, U. S., p. 478;
U. S. v. Atherton, 102 U. S., 372.

5. A bill which seeks to enforce against different defendants demands which are distinct is multifarious.
Gains v. Chew, 2 How., 619.

6. The judgment record imports absolute verity—and is only to be assailed by direct and precise allegations of fraud. It admits of no contradiction. *Facit ex curvo rectum, ex albo nigrum.*
1 Freeman on Judgments, Sec. 76, 77–8–125.
1 Black on Judgments, Sec. 273., pages 233–4.
Jeter v. Hewitt, 22 How., 352.

"The record is conclusively presumed to speak the truth, and can be tried only by inspection."
1 Black on Judg., 273;
Wilcher v. Robertson, 78, Va., 602;
Mobley v. Nave, 67 Mo., 549.

7. The satisfaction of one judgment of two or more for the same debt is a satisfaction of the entire claim.
2 Freeman on Judg., 467.

ARGUMENT.

The case below went off upon demurrer to the bill, and the question here is, whether the judgment is correct upon any ground. The decision will be affirmed if there is any ground for it to rest upon, irrespective of the reasons assigned for the judgment of the lower court.
McClellan v. Silliman, 6 Wheat., 598;
Davis v. Packard, 6 Pet., 48;
Shrewsbury v. Miller, 10 W. Va., 122.

And as in the Federal courts, special grounds of de-

murrer do not have to be assigned, or, if assigned, are no restriction upon assigning other grounds at the hearing *ore tenus*, the inquiry as to the sufficiency of the bill is not restricted by the special demurrer, though it seems to cover every defect. We will, therefore, only enumerate the objections to the bill as they occur in the argument, first taking up those relating to the form and manner of proceeding, and then those relating more directly to the merits of the case.

THE BILL IS MULTIFARIOUS.

We admit that the question of multifariousness is largely one in the discretion of the court, but there are cases, of which this seems to be one, which are obviously open to the objection.

Gaines v. Chew., 2 Howard, 619.

The bill shows that the United States had a joint claim against Eugene Beebe and Ferrie Henshaw, as sureties upon the bond of one Widmer, as Collector of Internal Revenue, who made default in a large amount, some $28,000, and that it had also a separate and distinct claim against Eugene Beebe, as a surety upon the bond of one Duston as a deputy postmaster, at Demopolis, Ala., who also made default. Rec. 2 and 28.

The United States elected to sue the joint sureties, Beebe and Henshaw, separately, and also sued the individual surety, Beebe, in a separate suit, and in these several suits separate judgments were rendered in favor of plaintiff by proceedings regular upon their face. The judgments against the joint sureties were each for $100 and costs. The judgment against the individual surety was for $579.45 and costs. Rec. 5 and 29.

One of the judgments against one of the joint sureties, namely, Beebe, was paid in full in July, 1886, the judgment being rendered in 1885. Rec. 5.

The judgment against Beebe upon his separate suretyship was rendered December 26, 1878, and execution issued thereon, and was returned no property in 1880. Rec. 29.

The bill is brought to enforce these three distinct claims jointly against the heirs and assigns of Beebe and Henshaw, both of whom are long since deceased. It is to be observed that Henshaw had no connection whatever with the individual claim of the United States against Beebe represented by the judgment for $579.45. There is no special prayer in the bill for relief as to this separate claim against Beebe. Nor is there any allegation in the bill impugning the regularity of this judgment. As to this claim, then, the bill is one to enforce a general judgment at law under a general prayer, if any imaginable relief could be granted thereunder.

As to the other judgments rendered separately against Beebe and Henshaw upon their joint suretyship, one of which has been paid in full, the bill avers that they were rendered under circumstances which entitle complainant to have them vacated as fraudulent and void. Accordingly, the bill avers facts which, in the opinion of the pleader, entitle the complainant to regard the judgments as void and asks for a collection in full of the demand upon which they were rendered, the amount of which is stated. And as to each of these separate judgments on the joint demand, it will be observed that there is no averment anywhere in the bill of any facts which would entitle the complainant to join Beebe and Henshaw, or their heirs and assigns, in one suit to vacate

the several judgments rendered on this joint demand.

It seems obvious that if a creditor, having a joint demand against A and B, elects to sue them separately, when they might have been sued jointly, and recovers several judgments against them, there is no right thereafter to proceed against them jointly to vacate the judgments, on account of acts done by them severally, in the prosecution of the suits against them. If A, in the proceedings against him, commits acts which entitle the creditor to vacate the judgment against him, it must be done in a separate suit, as B is not to be charged with the conduct of A, in which he does not participate. Likewise, if B does acts which entitle the creditor to vacate the judgment against him, A cannot be joined in a suit for that purpose and be made responsible for the acts of B in which he did not participate.

The fact that the separate judgments were rendered upon a joint demand, can make no difference, because there may be different recoveries upon the same demand, whether *ex contractu or ex delicto*, which is sued separately. While the recoveries may be different, the creditor has the election of seeking satisfaction of the largest judgment. The fact, then, of the existence of cause to vacate the separate judgments, and the prosecution of that right, as to one or both of the judgment debtors, would give no right to join them in one suit in the prosecution of such right against them both, unless it is distinctly averred that by some act of conspiracy between the defendants the several judgments were fraudulently secured. If there is no such act of fraudulent conspiracy alleged in the bill, then, the case stands thus: A bill by a creditor having several judgments against two defendants on a joint demand, and a several judgment against one of the defendants upon an individual demand,

to vacate the separate judgments upon the joint demand on the ground of separate frauds by the separate defendants against the complainant on their rendition, and to collect the original joint demand against both of the defendants, and the individual judgment against one of the defendants on an individual demand.

It seems obvious that such a bill is multifarious. Taking it for granted in this immediate discussion that the grounds for vacating the judgments against Beebe and Henshaw are sufficient against them severally, there can be no more reason for joining these defendants in a bill to vacate separate judgments against them for separate frauds committed by them in the individual proceedings against them, than there would be to join them in such a proceeding for a fraud committed by one of them without the concurrence of the other, since it must be obvious that separate acts committed without concert and conspiracy cannot be imputed to strangers, and therefore, as to them, are the same as if not committed. To place complainant's bill, then, in the supposed category, it is only necessary to verify the statement, by an inspection of it, that there is no joint act or conspiracy alleged against the defendants—which we will now shortly proceed to do.

The original bill in the 7th paragraph (R. 5), after stating the rendition of the judgments against the defendants separately, says:

"Said judgments were entered under the following circumstances: That said defendants came into court, and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferrie Henshaw were poor men, and that said Beebe and the estate of said Ferrie Henshaw (who is dead, and was represented by his administrator,

one Hatchett) were without property out of which said judgment could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their sureties, by execution, but that if the court would allow a jury and verdict to be entered against them, for $100, they and each of them would pay said judgments and costs; that no evidence of proof was or had been introduced in said causes, or either of them, and the indebtedness of said Beebe and Henshaw to the United States then being $28,158.56 and interest, or other large sum; and the statements and representations aforesaid were only before said Circuit Court at the time of the entry of said judgments; and no hearing or determination upon the law and facts involved in said causes was ever had in said court; whereupon the court remarked, that unless the District Attorney of the U. S. objected, the causes might be disposed of as suggested aforesaid; said District Attorney did not object, and said judgments for $100 and costs were entered in each of said causes. And orator avers and charges that said statements and representations made as aforesaid, being on behalf of, and for, said Beebe and said Ferrie Henshaw, and the estate of said Ferrie Henshaw, were wholly untrue, and were made to deceive said court and U. S. Attorney, and for the purpose and with the intent to defraud the United States." The bill then further avers that the court had no authority to accept said statements; that they were not under oath, or in the course of judicial proceedings; and that the acts of the court and U. S. Attorney amounted in law and in fact to a compromise of said demands; and that there was no authority to make the same, and that the judgments are void. On page 29 of the record, the bill, with reference to the said judgments, is amended by averring, that the recital in the judgment entry that a jury of

twelve good and lawful men, to-wit, G. L. Werth and eleven others, duly found said several verdicts for the plaintiff, was false, that in fact no such verdicts were found; that no question was submitted to any jurors in said causes; that in fact the jurors were discharged two days before the entry of the judgments.

These constitute the entire averments of the bill in reference to the conduct of the defendants in said suits respecting the rendition of said judgments, and taking it for granted that the complainant is entitled to relief against each judgment, it is quite obvious that there is no allegation making Beebe responsible for the act of Hatchett, as administrator of Henshaw, or making Hatchett, as administrator of Henshaw, responsible for the act of Beebe. Indeed it is legally impossible for an administrator to act thus for his trust. The defendants had each been sued separately, by the election of the complainant, these suits were necessarily prosecuted separately, the acts and conduct of each defendant were necessarily addressed to the court and district attorney in the suit against themselves separately, and there is no averment of any joint act by them, and the act of Hatchett if any in favor of Beebe must have been personal and not as administrator. And even if the defendants had joined in making the statements mentioned with reference to each separate suit—which is not averred, and which cannot be assumed to be a fact—it would still only give the complainant a right to have the judgment in the particular suit set aside by a separate proceeding against the defendant in that suit, his heirs and assigns. An election once deliberately made can not be retracted; and so the complainant after having elected to sue severally the joint sureties, and having recovered judgments, cannot sue jointly to vacate the several judgments. Without further discussion of

this point, it seems obvious that if there ever was a case of multifariousness, this case falls distinctly in that class.

Story's Eq. Plead., Sec. 271.

THE BILL IS WITHOUT EQUITY, AS NOT OFFERING OR SUBMITTING TO DO EQUITY, BY RETURNING OR OFFERING TO CREDIT THE JUDGMENT WHICH HAS BEEN COLLECTED.

The soundness of this point is not to be tested by the smallness of the judgment collected, or the alleged greatness of the original demand. Principles are not tested by amounts in particular cases. The question is, whether a plaintiff having two several judgments against separate defendants upon a joint demand, can collect one of the judgments or both of them, and then file a bill to set aside the judgments and proceed upon the original demand without a return or credit of the money collected. To allow this to be done, would violote one of the clearest and most universal principles of equity, which is embodied in the maxim: "He who seeks equity, must do equity."

1 Pomeroy's Eq. Juris., Secs. 385 and 395;
Hatchett v. Blanton, 72 Ala., 423.

The United States, when it comes into equity, submits to the rules and principles governing courts, just as a private individual does, and it can no more assume an inconsistent position, than an individual can; and it is clear that a private person cannot take under and against a will, or under and against an assignment, or claim the benefit of a judgment, and at the same time, proceed upon the original consideration. It is evident that the complainant in this case, who shows in the bill

the payment of one of the judgments, and sets up a claim that the other is due and owing to the United States, has no standing to proceed upon the consideration of the judgments and for their vacation and annulment, without a submission to do equity by returning the money collected—which has not been done in this case. It is not impossible that the amount of the judgment may exceed the recovery on the original demand.

THE BILL MAKES NO CASE FOR THE ANNULMENT OF THE JUDGMENTS.

The peace of society requires that some limit be put upon the right to reopen controversies. The rule is embodied in the maxim: "*Interest rei-publicae ut sit finum litium.*" And this maxim is illustrated alike in the rule which makes "time cover past transactions with her mantle of repose," and that which gives to judgments in adversary proceedings, unimpeached for fraud, the sanctity of absolutism. Courts are instituted for the very purpose of finally closing controversies involving rights and duties. The proceedings are what is called "adversary." Each party understands that he must bring to bear upon the issue joined every resource of argument and evidence calculated to have a bearing upon the result. He is forewarned that the judgment rendered, unless impeached for error apparent upon the face of the proceedings, forever puts at rest the matters at issue. Here the complainant selected its tribunal, and selected the attorney to represent it, and confided the management of its case to this attorney, and by compulsory process forced the defendants to come in and defend against its claims. They did so, and the records of the tribunal show upon their face regular

proceedings, terminating in judgments for specific sums. The factum and effect of the judgments, under such circumstances, can no more be minimized or vacased by the allegation that they were the result of a *ruse de guerre*, than can Spionkop and Gettysburg upon like suggestions. These civil battles are as conclusive, with one exception, as the imperious mandate of martial force. The exception in favor of the civil proceeding is, that if it is averred and shown that the judgment is the result of fraud of one party by which the other, without fault on his part, was prevented from having a fair trial and decision of his case, the judgment will be set aside and a new trial awarded. This rule, as to the finality of judgments, is one of public policy and seems to be absolute and universal. The matter is most fully considered in the case of Pico v. Cohn, 91 Cal., 129, and the notes of Mr. Freeman in the report of the case, in 25 American State Reports, 159; also, in the case of the United States v. Throckmorton, 98 U. S. 61, and in Marine Ins. Co. v. Hodgson, 7 Cranch, 332, and in cases cited in Marshall v. Holmes, 141 U. S., page 596.

Unless fraud of the character mentioned is alleged, the judgment-roll imports absolute verity. That is to say, the recitals and statements of the record cannot be impeached except by the record itself. This excludes all parol evidence of the falsity of record recitals, and in this case excludes every averment of the bill impeaching the judgments, if the averments were in other respects sufficient.

In Mobley v. Nave, 67 Mo., 549, it is said:

"If it could be shown by parol that a court was in session, when the records of such court show that it stood adjourned on that day, we see no reason why it cannot also be shown by parol that a court was not in

session, when its records show that it was in session. The confusion and injury which might ensue upon the admission of parol testimony for such purpose in a collateral proceeding is manifest. Proceedings in a court of record are only to be proved by the record." Citing a number of authorities.

See also 1 Freeman on Judg., 125.

As the allegation of fraud is the only means by which we may look behind the judgment-roll, the first question is, whether or not there are such allegations in the bill. This court has decided that the only fraud which will authorize the vacation of a judgment is one which is extrinsic or collateral to the question examined and determined in the original action. And that a fraud is not extrinsic or collateral within the meaning of the rule unless it is one the effect of which prevents a party from having a fair trial without his fault.

U. S. v. Throckmorton, 98 U. S., *supra;*
Pico v. Cohn, 91 Cal., *supra;*
Marine Ins. Co. v. Hodgson, *supra.*

We have quoted above at length the allegations of the bill relating to the rendition of the judgments. And it will be seen by a reference to them, that there is no insinuation that that the District attorney was corrupted by either of the defendants, or that the court trying the case was corrupted by either of the defendants. Every resource of the Government was at the command of the District Attorney representing it in the litigation, and if he allowed the judgments to go as stated in the bill, it is evident that it was by his own fault, and his fault in the management of the matter committed to his care is the fault of the plaintiff. The acts of the defendants, by the statements of the bill, were mere verbal declara-

tions in court, which the District Attorney was warned by his hostile position not to credit, or to credit at his peril. Suppose the declarations of the defendant were material to the issue tried, and were sworn to in a plea duly filed, or were deposed to upon the stand, would the adverse party be entitled to relief because of the falsity of the statements? The authorities clearly hold the negative. How much more, then, should mere loose and immaterial verbal declarations afford no right to relief. It is evident, then, that notwithstanding all the allegations of the bill, the plaintiff might, but for its own fault, have had a fair trial at law; and beyond this it is likewise evident that the statements charged against the defendants were not fraudulent in any respect, and are not shown not to have been honestly believed by them when made; and, indeed, are not shown not to have been absolutely true, as to each of the defendants; for the bill shows a formal report to the State court of the insolvency of Henshaw's estate, and a return of no property found on executions against Beebe by the U. S. Marshal on one of the judgments sought to be collected in 1880, five years before the acts charged in the bill. And it is nowhere alleged or suggested in the bill that the defendants had any property free from superior liens at the date of the judgments.

The allegations of the bill, then, with respect to the alleged frauds, are insufficient in every respect. The plaintiff believed the representations set out at its peril, and, besides, the statements were innocent, were not calculated to mislead any one, and may have been absolutely true.

No sufficient fraud, then, is charged, and the judgment-roll thus imports absolute verity, and it reciting that the judgment was in pursuance of a verdict found

"by a jury of good and lawful men, to-wit, G. L. Werth and eleven others," all inquiry as to the truth of this recital is cut off. We are required to believe the judgment rather than any parol evidence to the contrary. This court said in the case of Jeter v. Hewitt, 22 Howard, 363–4, that the authority of *res judicata* is absolute, its words being:

"That the maintenance of public order, the repose of society, and the quiet of families, require that what has been determined by competent tribunals shall be accepted as irrefragable truth; so deep is this truth implanted in her jurisprudence, (referring to Louisiana), that commentators upon it have said, that *res judicata* renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption it creates, and no argument can detract from its legal efficacy."

This requires us then, to accept the record as absolutely true and to exclude from consideration the allegations of the plaintiff that the recitals of the judgment as to the regularity of the trial are in fact false. The case of the plaintiff, then, as made by the bill, is without basis in form or in substance, and the judgment of the lower court so holding, it seems, should be affirmed.

REPLY TO APPELLANT'S POINTS AND AUTHORITIES.

The position of the appellant in the lower courts was, in effect, that defendants prosecuted by the United States were bound at their peril to see that the District Attorney was wise, vigilant and effective in the discharge of his duties against them, and that, if by any accident or slip on his part, or on the part of the court,

and, on the same principle, we might include the jury, a judgment is rendered for too small a sum, the records may be impeached collaterally by parol evidence, and the controversy may be opened up, on a bill such as this, *perpetually*—that is to say, after all the actors in, and the witnesses to, the particular transaction have passed away. And beyond this, it is claimed, that if the United States elects to sue one hundred people separately and severally on a joint demand, and recovers in each case and collects one judgment, the election to sue separately and the payment in full of the demand may be disregarded, and all the defendants may be united in one suit to vacate the hundred several judgments for several acts charged against the several defendants, and to collect the original demand without any offer to return the collection made.

Is this an exaggeration, or a legitimate extension and application of the position of the appellant?

We undertake to show that this is the legitimate result of what is claimed.

In the first place, if two several judgment debtors may be united, there is no reason why the number should not be extended. Two are here united, and the representations which the defendants are alleged to have made were several, each for himself, and the act of the District Attorney in taking separate judgments was several as to each defendant, and one of the judgments was paid, and there is no offer to do equity. The last part of the charge, then, is made out.

As to the first part, the bill seeks to impeach the verity of a judgment by parol evidence contradicting the judgment-roll, and does not allege more than that

the District Attorney representing the appellant was remiss in the discharge of his official duties.

It thus appears that the theory upon which appellant's contention rests is not over-stated. And as stated it is believed it can find acceptance with no court.

The theory upon which the contention rests is that the District Attorney was a mere attorney in the case, and that he had no authority to *compromise* a claim of the Government—and that the case in hand was *compromised*, and thus does not bind the Government. And the chief authority relied on is the case of Holker v. Parker, 7 Cranch, 436.

It is not denied that the powers and authority of an attorney are limited and special. But we do deny that there is any limitation upon the power of the attorney to neglect his client's case, so far as third persons are concerned. In the conduct of the cause, he is the *alter ego* of the principal, and no reason or authority can be found to the point, that strangers, and especially adverse parties, have any duty to perform in seeing that he discharges his duties in a proper way, so long as there is no corruption of the attorney and no hindrance interposed by the defendant to the proper discharge of his duty. It would be exacting too much of human nature to impose upon an adverse party any duty respecting the conduct of opposing attornies beyond that of legal fairness.

As to the case of Holker v. Parker, 7 Cranch, 436, it may be reconciled with the general doctrine as to giving relief against judgments expressed by the same judge in the previous case of Marine Ins. Co. v. Hodgson, in the same volume, page 332, and confirmed in numerous

cases since then, including United States v. Throckmorton, 98 U. S., 61, and indeed down to Graver v. Faurot, 162 U. S. 535, which clearly approves the case of Throckmorton.

It will be observed that no question is made in the case of Holker about the verity of the judgment, but only the conclusiveness of the award on which the judgment is rendered.

The obvious reason of this is, that judgments on awards are in fact on their *face* consent judgments; and "consent judgments are, in effect, merely contracts of parties, acknowledged in open court, and ordered to be recorded." The court in such cases, as is said in T. & P. R. Co. v. S. P. Co., 137 U. S., 48, and L. M. Co. v. Janesville C. M., 138 U. S., 552, merely records what is agreed in advance, and thus the matter is not *res judicata*.

And in such cases, when the parties act in a representative capacity, such judgments do not bind the *cestuis que trustent*, unless the trustees had authority to act.

Union Bank of Richmond v. Commissioners of Oxford, 119 N. C., 214;
Texas & Pac. R. Co. v. Southern Pac. Co., 137 U. S., 48;
Gay v. Parpart, 106 U. S., 679–699;
Lawrence M. Co. v. Janesville Cotton Mill, 138 U. S., 552;
Wadhaws v. Gay, 73 Ill., p. 433-4-5;
Norton v. Brownsville, 129 U. S., p. 505.

The record in the case of Holker did not disclose a judgment in the ordinary form, and the impeachment

was thus merely of the award. The holding of the court was, that an attorney cannot compromise without authority. It will be observed, too, that the court lays much stress upon the accident of the defendant's detention from attendance by arrest in a distant state. Here, however, the judgments are regular on their face, and appear to be in adversary proceedings, and are thus conclusive, unless it was alleged that the District Attorney was corrupted and was not merely negligent.

The complainant thus does not bring itself within the general rule that he must be without fault. In the case of Throckmorton, the District Attorney was as negligent as in this case, but he was not corrupted, nor was he here, and the judgments are as conclusive in the one case as in the other. The judgment entry nullifies all averment contradicting its statements in the absence of fraud, as defined in the case of Throckmorton; and there being no such charge here made, the judgment recital precludes any consideration of the question of the compromise of the claims by the District Attorney.

Independent, then, of all questions relating to the frame of the bill and other preliminary matters, it seems that the bill is insufficient on the merits, and that the lower court correctly so determined.

W. A. Gunnell

Office Supreme Court U. S.
FILED
OCT 30 1900
JAMES H. MCKENNEY,
Clerk.

Cottell for Appellees

Filed Oct. 30, 1900.

me Court of the United States,

OCTOBER TERM, 1900.

No. 31.

rom the United States Circuit Court of Appeals
for the Fifth Circuit.

E UNITED STATES OF AMERICA,
Appellant,
versus
EUGENE REESE, *et al. Appellees.*

nd Arguments of Alexander Troy and
y S. Cottell, Attorneys for all the Appellees,
of the Henshaw heirs.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 71.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

versus

EUGENE BEEBE, *et al., Appellees.*

Brief and Argument of Alexander Troy and Henry S. Cattell, Attorneys for all the Appellees, except the Henshaw heirs.

STATEMENT.

The original bill in this case was filed in the Circuit Court of the United States for the Middle District of Alabama, on the 10th day of March, 1890 (Record, pp.

1-14), against the appellees named above, except W. R. Waller, administrator of Eugene Beebe, and others. Its material allegations were substantially as follows:

That in June, 1873, Eugene Beebe and Ferrie Henshaw became sureties on the official bond of one Widmer, collector of internal revenue of the Second District of Alabama, in the sum of $50,000, conditioned for the faithful performance of his duties (Record, p. 2). That Widmer failed to account for and pay over a large sum of money, to wit: $28,158.56, which had come into his hands as such collector; that that sum was due and unpaid to the United States at the time of the filing of the bill, with interest from January 1, 1874 (Record, pp. 2-3).

That Beebe and Henshaw had for many years been partners in business, and were joint owners in fee of a number of parcels of real estate situate in and near the city of Montgomery, which were fully described in the bill (Record, p. 3).

That Henshaw died April 19, 1879, leaving certain heirs at law who were named (Record, p. 4). That on June 13th, letters of administration on his estate issued to one Hatchett, and that on the 17th of April, 1880, Hatchett reported to the Probate Court issuing the letters that the estate was insolvent. That accompanying his report was a full statement of all of Henshaw's real and personal property which had come to his knowledge, and all the claims against his estate, which claims, including the debt claimed by the United States, aggregated $54,932.50. That he prayed that the estate be declared insolvent, and that on the 2nd day of July, 1880,

the Court rendered a decree declaring the same insolvent (Record, pp. 4-5).

That Hatchett was removed as administrator, and one Bellinger became such in his place on the 9th day of December, 1882. That Bellinger resigned on the 28th of November, 1883, and no other administrator had ever been appointed on his estate.

That the estate remained unsettled and undetermined, and the personal assets were insufficient to pay the debts (Record, p. 5); that on the 2nd day of July, 1880, Beebe was and had ever been insolvent, without sufficient property to pay his debts, including the debt to the United States (Record, p. 5). That Henshaw was insolvent and without sufficient property to pay his debts (Record, p. 5).

It is then averred that, by reason of the insolvency of Beebe and Henshaw and of the estate of Henshaw, the United States became entitled to priority of payment over any and all other creditors and of their property to the full amount withheld, appropriated and due by Widmer (Record, p. 5).

That on the 3rd day of June, 1880, separate suits were instituted in the Circuit Court of the United States for the Middle District of Alabama by the United States against Beebe and against the administrator of Henshaw, for the recovery of the money due by Widmer; that such suits were continued from time to time at the request and instance of the defendants, until February 6, 1885, when judgments were entered in the court against Beebe, and

against Hatchett as administrator, each for $100 and costs; that on the 1st day of July, 1886, Beebe paid into the Treasury of the United States the sum of $109.85, the amount of judgment and costs rendered against him, but the judgment against Hatchett as administrator remained wholly unsatisfied and was due and unpaid to the United States (Record, p. 5).

The bill then avers that judgments were entered under the following circumstances: "Said defendants came into open court and stated and represented, and caused to be stated and represented for them, that said Beebe and said Henshaw were poor men; that said Beebe and the estate of Henshaw were without property out of which the judgments could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them or either of them or their estates by execution, but that if the Court would allow a jury and verdict to be entered against them for $100, they and each of them would pay said judgments and costs;" that no evidence or proof was or had been introduced in the causes, and the statements and representations aforesaid only were before the Court at the time the judgments were taken, and no hearing or determination upon the law or the facts involved in the causes was ever had.

That upon these statements being made, the Court remarked that unless the District Attorney of the United States objected, the causes might be disposed of as suggested; that the District Attorney did not object, and the judgments were entered for $100 and costs as stated in each of the cases.

That said statements and representations were wholly untrue, and were made to deceive the Court and the United States District Attorney, and for the purpose and with the intent to defraud the United States; that the Court and the United States District Attorney had no authority in law to accept said statements and representations, which were not made under oath nor in the course of judicial proceedings, and were not supported or verified by evidence or proof; that the acts of the U. S. District Attorney amounted in law and in fact to and were, and were intended to be, a mere naked compromise of the claim and demand of the United States against the parties which neither the District Attorney nor the Court had any authority to make, but which they were inhibited by law to make, entertain and consummate; that the Court was without jurisdiction and power to determine the causes in such a manner, and the judgments for $100 and costs were null and void *ab initio* and should be vacated and held for naught in a court of equity (Record, pp. 5-6).

That the Montgomery Light Company, Montgomery Land and Improvement Company, Freedman Vinegar and Cider Works, the Southern Cotton Oil Company, Cleveland Cider Company and Abbie F. Rice assert some claim against certain portions of the property, the nature and extent of which is unknown to complainants; but that such claims are all subordinate to the rights of the complainants to condemn and subject said property to the satisfaction of the debt due by Beebe and Henshaw as bondsmen of Widmer (Record, p. 6).

That if either of the persons or corporations named in the bill claim under or by virtue of any conveyance

from Beebe or Henshaw, or the heirs of Henshaw, the conveyances were each and all without warrant and authority in law, and were and are null and void, and should be vacated, set aside, and held for naught (Record, p. 7).

That on the 22nd of March, 1877, Beebe conveyed all his interest and estate in the property described in the bill to Henshaw, together with certain other property described therein, the same constituting all the real and personal property then owned and possessed by him, Beebe, for the alleged purpose of securing certain pretended liabilities of Beebe to said Henshaw, and to protect and secure real or pretended creditors of the firm composed of said Beebe and said Henshaw, and to enable the said Henshaw more easily and readily to settle and pay the debts of said firm, and to secure him for all moneys Beebe might owe the firm or him on a settlement (Record, p. 7); that the deed contained a provision that if any of the property was not required to be sold for the purposes for which it was conveyed, then on final settlement Henshaw should reconvey the same to Beebe (Record, p. 7). That this deed from Beebe to Henshaw was without consideration and fraudulently made to hinder, delay and defraud the creditors of Beebe, and was void, and that all the property described in the bill remained in the hands of Henshaw, and none of it had been required to be sold for the purposes for which it was conveyed, and that a final settlement had been had of all matters of account and difference between them (Record, p. 7), whereby Henshaw became, and his administrator was and is, bound, and should be required, to reconvey the property to Beebe free of incumbrance (Record, p. 8). That if

the complainants were mistaken in the above allegation, then the property conveyed by Beebe to Henshaw became and was answerable in the hands of Henshaw, his administrator and heirs for the debt due to the United States by Beebe by reason of the default of the said Widmer (Record, p. 8).

The bill prays that said judgments be set aside, vacated and held for naught; that the administration of the Henshaw estate be removed into and settled by the United States court; that an account be stated to ascertain what is due on the bond of Widmer, and that the amount found to be due be held to be a first and prior lien on the property described in the bill; that all conveyances and assignments of the property in conflict with the right and title of the United States be set aside and held for naught, and the property sold for the payment of the debt free from all incumbrances (Record, pp. 8-9).

Each of the defendants filed separate demurrers to the bill. They were substantially the same. Those of Beebe, the Montgomery Land and Improvement Company, Montgomery Light Company, Southern Cotton Oil Company, and Abbie F. Rice, are to be found in Record, pp. 33-37.

The demurrers were sustained—November 6, 1890—and leave granted to amend the bill of complaint (Record, pp. 39-40).

Thereupon on the 5th day of January, 1891, complainant amended the bill (Record, pp. 28-30).

The amendment averred the execution of another

official bond in which Beebe alone, and not Henshaw, was surety upon the bond of one Dustan, Deputy Postmaster at Demopolis, Alabama, in the sum of twelve thousand dollars. A default upon the part of Dustan and the recovery of a judgment for $579.45 in 1878 against his surety, Beebe, in the same court, which judgment was still due and unpaid, an execution thereon having issued and been duly returned "no property."

That the records show that the judgments against Beebe and Hatchett, the administrator of Henshaw, on the Widmer bond, mentioned in the original bill, were regularly had upon a jury and verdict, whereas, in truth and in fact, no jury was then in attendance in said court, and no such verdict was rendered; that the jurors in attendance upon said court had been finally discharged two days prior to the day upon which said judgments were entered, to wit: On February 4, 1885, and that the facts averred were discovered after the filing of the original bill, upon an examination of the records of said court, and some persons who served as jurors at that court, and from the original papers in the cause, which papers do not show the verdict of a jury.

The eleventh paragraph is amended by adding to it an averment that "said Henshaw as such assignee and the heirs of said Henshaw, have paid indebtedness due by said Beebe before having satisfied and paid the debt aforesaid due to the United States, to wit: amongst others a debt due by said Beebe to Mrs. Sarah S. Watson and J. C. Watson, amounting to about fifteen thousand dollars" (Record, pp. 28, 29, 30).

There was no prayer in the amendment.

To the bill as amended the defendants all again demurred, assigning the grounds of demurrer to the original bill, and the following additional grounds: (Record, pp. 40-41 and 54.)

1. That the bill made a new case.

2. That the matters stated in the amendment were not germane to the purpose and object of the original bill, and was new matter.

3. That the bill as amended was multifarious.

Beebe died, and a bill of revivor was filed against his heirs at law and the administrator and they were made parties.

On the 29th day of May, 1897 (Record, pp. 47-50), the case was submitted to the Court on the demurrers to the amended bill. The demurrers were sustained, and the bill was dismissed out of court (Record, pp. 56-57).

There was an appeal by the United States to the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the decision of the Circuit Court of the United States for the Middle District of Alabama, and the United States prosecuted this appeal from the last mentioned decision.

Opinion of the United States Circuit Court of Appeals for the Fifth Circuit Affirming the Judgment of the Circuit Court of the United States for the Middle District of Alabama, which Sustained the Demurrers and Dismissed Appellant's Bill.

Before McCormick, circuit judge, and Swayne & Parlange, district judges.

SWAYNE, district judge, delivered the opinion of the Court.

"It is evident that this is a suit to vacate, annul and set aside the judgment of a Court regularly entered in a matter of which it had jurisdiction, with all the parties before it, on the ground that the said defendants, Beebe and Henshaw, stated to the Court that "they were poor men and were without property; that nothing could be made out of them by execution, and that these statements were wholly untrue and were made to deceive the Court and the United States attorney and with the intent to defraud the United States."

In *United States* vs. *Throckmorton*, 98 U. S., page 61, Mr. Justice Miller announced the established doctrine on this subject to be "that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a Court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first Court, and not to a fraud in the matter on which the decree was rendered."

It is difficult to see upon what theory the judgment in this case can be set aside. The alleged false statements

in the suits brought by the United States on the bond in question were not such as to deceive a person of ordinary care. They could not have deceived the District Attorney who represented the government either as to the amount due on the bond or as to the property owned by the defendants. They did not in any way prevent the government from showing its cause of action and taking judgment for the full amount due if it saw fit to do so. Then in about fifteen months after the entry of said judgment the government accepted satisfaction of the same by the officers of the Treasury Department accepting the $100, with interest, from Beebe. We think the facts of this case bring it under the well-known rule announced in *U. S.* vs. *Throckmorton, supra,* and the cases following it, and that the judgment below should be affirmed."

ARGUMENT.

The principal contention of appellant is that in the entry of these judgments by the United States Circuit Court at Montgomery, Alabama, the Court exceeded its jurisdiction; that in assenting to said judgments the United States District Attorney exceeded his power; that the judgments so entered were not in fact judgments of the Court, but simply a compromise of the government's claim, and that the assent of the District Attorney having been induced by fraudulent statements upon the part of defendants (appellees) the judgments should be vacated and annulled.

It is conceded that the Court had jurisdiction of the subject matter, and the parties to these suits and that the issues to be tried were the amounts of indebtedness of the defendants, sureties upon the bond of a defaulting public officer and their liability therefor (Appellant's brief, page 10).

The amendment to the bill (Record, p. 29) shows the presence of a jury and the rendition of a verdict and entry of judgments upon said verdict, but appellant further seeks to avoid the judgments and to have them declared null and void, upon the averment that there was in fact no jury present at the time the judgments were entered, no submission of testimony to the jury, no verdict thereon, and that the District Attorney was induced to consent to the entry of the judgments for an amount less than that actually due by the false representations of the de-

fendants to the effect that they were poor men; that they had no property and that nothing could be made out of them or their estates by execution. Appellant contends that these averments, if true, would entitle it to have the judgments vacated. The truth of the averments could only be shown by parol testimony to contradict the record.

The United States is not Entitled to any Other or Greater Measure of Relief than Would be Accorded to an Individual Suitor under Like Circumstances.

1. By the uniform decisions of this Court, it has been settled that when the United States comes into court attempting to assert alleged legal rights, the same rules which govern ordinary suitors apply to it. By virtue of being the sovereign, it is not entitled upon any state of facts to any greater relief or measure of relief than would be awarded by the Courts on the same state of facts to the ordinary private citizen. Therefore, when the United States files its bill seeking to annul and vacate a judgment rendered by a competent Court, it cannot obtain relief, unless the facts which are alleged and proved would in the same proceeding entitle the citizen to the relief prayed.

Mitchell vs. *United States*, 9 Peters, 711.
The Syren, 7 Wall, 159.
Chicago vs. *United States*, 104 U. S., 685.
United States vs. *Beebe*, 17 Fed. R., 36.

The case of *United States* vs. *Beebe*, 17 Fed. R., 36, contains a full collection of the authorities sustaining this position. The opinion in that case was delivered by a judge who, by his learning and ability, has deservedly won for himself a high position in the American judiciary.

The only exception to the rule as stated above is that the statute of limitations does not interfere with the granting of relief to the United States where the citizen might be barred, but the United States, like an individual, will be bound by the presumptions which arise from long years of acquiescence in the acts of its agent. From this long acquiescence and from the failure to refund or offer to refund money received by it through the act of its agent, the authority of the agent in the first instance will be presumed or, at least, a subsequent ratification.

The United States, when it comes into a court of equity, and asks that relief be granted it, must show, like an ordinary suitor, upon the face of the bill that it has a clear and unquestionable right to the relief which is sought.

United States vs. *DesMoines*, 142 U. S., 540.
United States vs. *Beebe*, 17 Fed. Rep., 36.

Payment and Satisfaction of the Judgment against Beebe was in Law Payment and Satisfaction of the Judgment against the Administrator of Henshaw.

2. The facts shown by the pleadings are, that Eugene Beebe and Ferrie Henshaw were sureties on the bond of one Widmer; that the condition of the bond was, that Widmer would account for and pay over all money

which came into his hands as collector of internal revenue; that Widmer failed to pay over $28,158.56 thus collected for which his sureties were bound; that separate suits to recover the money were instituted by the United States against Beebe, and the administrator of Henshaw, deceased; that in 1885 there was a trial of each of said causes and a judgment for the plaintiff in each for one hundred dollars, besides costs; that Beebe, in July, 1886, paid into the treasury of the United States the full amount of the judgment against him; that said payment by Beebe was accepted by the United States as a satisfaction of said judgment and for no other purpose; that the appellant still holds said money, and did not offer before filing said bill and did not offer in its bill to either pay back said money to Beebe or to credit it on its claim against him. Beebe and Henshaw, having been joint sureties upon this bond, the obligation resting upon Beebe and upon Henshaw was the same, and, although no suit was brought against them jointly, but they were sued separately, the satisfaction of the judgment against Beebe was in law the satisfaction of the judgment against the administrator of Henshaw.

2 Freeman on Judgments, Sec. 467.
Cox vs. *Smith*, 10 Ore., 418.
Bank vs. *Manley*, 1 Strob., 414.
Sherwood vs. *Collier*, 24 Am. Dec., 264.
Matthews vs. *Lawrence*, 43 Am. Dec., 665.

The Judgments were Final Judgments. Regularly Entered in a Court Having Jurisdiction of the Cause and of the Parties, and the Record Cannot be Contradicted or Impeached nor the Judgments be Vacated Save for Fraud Extrinsic or Collateral to the Matter Tried.

The judgments in the cases brought and tried against Beebe and the administrator of Henshaw were judicial ascertainments that Beebe and Henshaw were liable to the government of the United States on account of the default of Widmer in the sum of one hundred dollars, besides costs, and no more. Into these judgments, the entire cause of action which the United States had against Beebe and Henshaw for the default of Widmer was merged, and this default should never again become the basis of a suit between the parties. No further action could be prosecuted between the parties to that suit in reference to the matters therein involved.

1. Freeman on Judgments, Sec. 215, and authorities cited.

The judgments rendered are conclusive that the amount recovered, and no more, was due, until they are set aside by some proper proceeding.

1 Freeman on Judgments, Sec. 249.
Fendall vs. *United States,* 14 Ct. of Claims Reps., 247.

The record of the judgment imports absolute verity, and its recitals cannot be contradicted or varied unless some recognized reason for vacating and annulling said judgments is averred or shown. Evidence *aliunde* cannot be introduced to contradict the recital that there was

a jury and verdict for the amount named unless there is an averment of facts showing such a fraud in the procurement of said judgments as would authorize a court of equity to set them aside.

Beverly vs. *Stevens*, 17 Ala., 701.
Deslonde vs. *Darrington*, 29 Ala., 92.
Note Duchess of Kingston's Case, 2 Smith, L. C., side pages 437-8.

The rule above noted as to contradicting the recitals of the record of judgments applies with as much force to consent judgments and decrees as to any others.

"The maxim that fraud vitiates every proceeding, must be taken like other general maxims to apply to cases where proof of fraud is admissible." But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted (*Green* vs. *Green*, 2 Gray, 361). Or, in other words, the recitals of the record of a judgment import absolute verity, until the facts are averred which show the judgment was procured by fraud; that is, that there was a fraud perpetrated by the party against whom complaint is made which would authorize a court of equity to vacate and annul the judgment.

Thompson vs. *Maxwell*, 95 U. S., 391.
U. S. vs. *Throckmorton*, 98 U. S., 61.
McDonald vs. *Pearson*, 114 Ala., 630.

"But the term 'fraud' is indefinite, and when it is said that a judgment is vitiated, and may be nullified by

fraud, it is not to be understood that the fraud which consists in false testimony, or the suppression of the truth, in respect to matters litigated upon the trial of the action which results in the judgment, is sufficient to have this effect."

Hilton vs. *Guyot*, 42 Fed. Rep. on p. 252.
Kimberly vs. *Arms*, 40 Fed. Rep. on p. 558.

"The frauds for which courts of equity will intervene to set aside and stay the enforcement of the judgment of the Court having jurisdiction of the subject matter and the parties, must consist of extrinsic, collateral acts, not involved in the consideration of the merits. They must be acts by which the successful party has prevented his adversary from presenting the merits of the case, or by which the jurisdiction of the Court has been imposed upon."

United States vs. *Flint*, 4 Sawyer, 42.

Mr. Justice Miller, in delivering the opinion of this Court in the case of the *United States* vs. *Throckmorton*, 98 U. S., 61, carefully considered the authorities as far back as the decision delivered in the year 1702 by the Lord Keeper in the High Court of Chancery, in the case of *Tovey* vs. *Young*, Pr. Ch., 193. He quotes the language of Ch. J. Shaw in *Green vs. Green*, 2 Gray (Mass.), 361, *supra*, and then uses the following language:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set

aside or annul a judgment or decree, between the same parties, rendered by a Court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first Court, and not to a fraud in the matter on which the decree was rendered.

"That the mischief of re-trying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

Mr. Justice Miller then points out that relief against a judgment will be granted in equity cases only "where by reason of something done by the successful party to a suit there was in fact no adversary trial or decision of the issue in the case. Where the successful party has been prevented from exhibiting fully his case by means of deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside or annul the former judgment or decree, and open the case for a new and a fair hearing."

Since that decision, *United States* vs. *Throckmorton*

has been cited with approval by this Court in the following cases:

Marquez vs. *Frisbie*, 101 U. S., 479.
Vance vs. *Burbank*, 101 U. S., 520.
Steel vs. *Smelting Company*, 106 U. S., 454.
Western Pac. R. R. Co. vs. *U. S.*, 108 U. S., 513.
Pac. Ry. Co. of Mo. vs. *Mo. Pac. Ry. Co.*, 111 U. S., 520.
Mahn vs. *Harwood*, 112 U. S., 365 and 368.
Moffatt vs. *U. S.*, 112 U. S., 32.
U. S. vs. *Minor*, 114 U. S., page 241.
Maxwell Land-Grant Case, 121 U. S., 379.
U. S. vs. *San Jacinto Tin Co.*, 125 U. S., 281 and 304.
Cragin vs. *Powell*, 128 U. S., page 699.
Marshall vs. *Holmes*, 141 U. S., 596.
U. S. vs. *DesMoines Co.*, 142 U. S., 540.
Hilton vs. *Guyot*, 159 U. S., 207.

In *Marquez* vs. *Frisbie, supra*, it is cited as authority for the statement that "it is idle at this day to suppose that the expensive machinery of a court of equity is to be put in operation for the purpose of reviewing and reversing the judgment of the tribunals to whom that question is by law entrusted on such loose, untraversable allegations of fraud in general."

In *Vance* vs. *Burbank, supra*, the doctrine of *United States* vs. *Throckmorton* is spoken of as "settled."

In *Moffat* vs. *U. S., supra*, the case of *U. S.* vs. *Throckmorton*, and *Vance* vs. *Burbank, supra*, are distinguished from that case.

There is no conflict between the case of *United*

States vs. *Throckmorton*, 98 U. S., 61, and the cases of *Johnson* vs. *Waters*, 111 U. S., 640, *Arrowsmith* vs. *Gleason*, 129 U. S., 86, or *Marshall* vs. *Holmes*, 141 U. S., 596. The case of *Johnson* vs. *Waters, supra*, was based upon "fraud in obtaining the judgment," the case of *Arrowsmith* vs. *Gleason, supra*, upon an imposition practiced upon the Court, and the case of *Marshall* vs. *Holmes, supra*, is based upon the fact "that the facts constituting the fraud were not, before the rendition of the decree, within the knowledge of the party seeking its annulment, or could not have been discovered in time to bring them in some appropriate mode to the attention of the Court while the decree was within its control," and in the case last cited it is said that equity would not interfere with a judgment rendered by a court of law if the party by the exercise of diligence could have ascertained the facts and presented them to the Court, and it is also held in that case that the failure to present the rights of the complaining party fully to the Court must appear to have been caused by fraud or accident unmixed with fault or negligence on the part of the complaining party.

As to the Alleged Fraud.

Applying, therefore, the doctrine and the rules set forth in the case of *United States* vs. *Throckmorton, supra*, and those which follow that decision, it is difficult to understand upon what theory it can be claimed that the judgments in the case under consideration should be set aside.

The so-called fraud of the defendants in the suits brought by the United States for the recovery upon the

bond in question, which, it is claimed, would justify a court in equity in setting aside the judgments, are that they represented or caused to be stated to the Court that "said Beebe and said Ferrie Henshaw were poor men and that said Beebe and the estate of said Ferrie Henshaw were without property out of which the said judgments could be paid and collected; that no part of said judgment could be collected by due process of law; that nothing could be made out of them, or either of them, or their estates by execution, but that if the Court would allow the jury and verdict to be entered against them for one hundred dollars, they, and each of them would pay said judgments and costs." And that said statements and representations were wholly untrue and were made to deceive said Court and the United States District Attorney (Record, pages 5 and 6); but it is not alleged that before the rendition of the judgments, the complainant did not know of the falsity of said statements, or could not by due diligence have discovered their falsity in time to bring the matter to the attention of the Court before the rendition of said judgments. "This requirement of diligence is, as it ought to be, enforced with strictness."

Marshall vs. *Holmes,* 141 U. S., 596.

As against the proposition that the complainant now has any right to ask a court of equity to set aside said judgments, it may be urged:

(*a*) *The bill distinctly avers that Beebe and Henshaw were insolvent and had no property* (Record, p. 5). Therefore, the government could not have been surprised and deceived by the statements made by Beebe and Hen-

shaw to the same effect, and the falsity of said statements, if known or susceptible of ascertainment by diligence at the time, cannot be made a ground for equitable relief against said judgments. It is a maxim of the law that "Where the means of knowledge are open to one, he is chargeable with knowledge from the date when he should have discovered the facts."

Foster vs. *Mansfield,* etc., 36 Fed. R. on p. 638.

The statement that Beebe and Henshaw were poor men and that nothing could be made out of them would seem not to be untrue, for the bill alleged that the administrator of Henshaw had reported to the state court declaring his estate insolvent, and, five years before the acts charged in the bill, viz.: in 1880, the United States Marshal had made a return of "no property" on an execution against Beebe. It is nowhere alleged or suggested in the bill that Beebe and Henshaw, at the time said alleged false statements were made, and at the date of said judgments, did have any property free from superior liens or which could have been reached by execution. The allegations of fraud are general, not specific. The statements alleged to have been made in behalf of Beebe and Henshaw with respect to their insolvency will not sustain the allegation of fraud, unless it is specifically averred and shown in *what* said statements were untrue, and further that said statements were not known, and could not by diligence have been ascertained to be untrue before the rendition of the judgments. The statements were not calculated to mislead or deceive for the reason that the truth or falsity thereof could have as easily been ascertained then as afterwards from an inspection of the public records.

(*b*) *It is not averred that the Court or the district attorney was in fact deceived.*

Non constat, the district attorney knew all the facts in relation to the property of Beebe and Henshaw, and their ability to pay, but deemed it for the best interests of the government to accept the verdict and judgment entered. It is not shown that there was any fraud in obtaining the judgment, or any fraud by which the Court was imposed upon or misled into a false judgment.

Johnson vs. *Waters,* 111 U. S., 640.
2. Freeman on Judgments, Sec. 489.
McDonald vs. *Pearson,* 114 Ala., 630.

The fraud of Beebe and Henshaw must have been such as to prevent the United States from successfully prosecuting its claim in the original suit in which the judgment was obtained, and this must have been without any fault on the part of the United States or its representatives.

Marine Ins. Co. of Alexandria vs. *Hodgson,* 7 Cranch, 332.
Marshall vs. *Holmes,* 141 U. S., 586.

It is always a condition precedent to a court of equity interfering with the execution of a judgment, that facts be disclosed establishing that the matter now in the form of an adjudication, was in truth, without any fault of the party seeking to avoid its effect, a determination in which he could not present his cause of action or ground of defence to the Court, either because the Court was not competent to hear it and grant relief thereon, or because he was prevented from presenting it or having it

properly considered by the Court, through fraud, accident or surprise.

2. Freeman on Judgments, Section 486.

A court of equity will not lend its aid to set aside a judgment unless the party claiming its assistance can impeach the judgment by facts or grounds of which he could not have availed himself at law or of which he was prevented from availing himself by fraud, accident or act of the opposite party, unmixed with negligence or fault on his part.

Watts vs. *Gayle*, 20 Ala., 817.
Morrison vs. *Udall*, 37 Am. Dec., 604.

Relief will not be granted against a judgment on the ground that it is contrary to equity unless the party was ignorant of the fact in question pending the suit, or unless that fact could not have been received in evidence in the action at law, or unless he was prevented from availing himself of it by fraud, accident or the act of the other party, unmixed with negligence or fraud on his part.

2. Freeman on Judgments, Section 486.
Kinney vs. *Ogden's Administrator*, 3 N. J. Eq., 168.
Hair vs. *Lowe*, 19 Ala., 324.
Hibbard vs. *Eastman*, 93 Am. Dec., 467.
Smith vs. *Worthington*, 53 Fed. Rep. on p. 981.

(c) *The questions involved in the allegations of fraud were all tried, or so in issue that they could have been tried.*

It is difficult to conceive how the statements, even if made by and for Beebe and Henshaw and utterly false

as alleged, could have prevented the government from presenting its cause of action. They could have had no bearing or relation whatever upon the question of the amount that the government was entitled to recover in the suit. They might have had some bearing or relation upon the question whether the government should compromise the judgment *after it was recovered*, but certainly they did not deprive the government of the opportunity of establishing its claim to the full amount that was due to it if it desired to do so. Fifteen months elapsed between the entry of the judgment and the date of its payment by defendants, and during that time it was possible for the government at any time, if deceived by the defendants, to have moved for a new trial.

(*d*) *The result was not unmixed with neglect or fault on the part of the United States.*

Conceding that the alleged false statements were made, they were not such as should have deceived the government. They were simply calculated to put the government and its attorney upon inquiry. For a creditor or his attorney to accept the statement of a debtor as to his solvency or insolvency at time of trial, and by reason thereof to forego without inquiry his right to enter a judgment against him for the full amount which he might be entitled to recover would be the grossest neglect, and negligence against which a Court of Equity will not relieve. The act of the attorney in such a case as we have seen above is the act of the principal.

Ezzell vs. *Watson*, 83 Ala. on p. 123.

(*e*) *Fifteen months after verdict and judgment plaintiffs accepted the amount thereof and thereby released and forever satisfied the judgment.*

Much stress is laid upon the fact that the District Attorney had no authority to consent to the rendition of the judgment. But as we have seen above, the United States is like all other parties to suits. They are bound by the same rules that any other parties are bound by. The District Attorney was undoubtedly authorized to represent it, and the law is well settled that the action in a pending suit of an attorney authorized to represent a party is binding on that party at law and in equity unless such action was induced by the fraud of the adverse party, and that fraud must have been one which prevented the assertion of the claim or defence. The allegations of fraud in this case fall far short of what is required in this respect, and it is confidently asserted that no cases can be cited where in the absence of such fraud a judgment has been opened or set aside after the full amount of it had been collected and received by the principal upon the mere allegation that the attorney had no authority to consent to the rendition of the judgment.

(*f*) *There is no equity in the bill; there has never been an offer to return the amount collected under the judgment.*

In 1886, about fifteen months after the rendition of the judgment, the government of the United States accepted satisfaction of the same. We must presume, because it is not denied in the bill, that the officer of the Treasury Department who accepted this one hundred dollars with interest thereon, from Beebe in satisfaction of the judgment against him, was authorized to accept it. There has been no offer to return the amount of the judgment, and without such offer the bill could not be sustained.

Suppose A, as attorney for B, has a suit pending against C. C makes a statement to A that he (C) is a poor man and has no property subject to execution, but if A will take a judgment for a small per cent. of his claim, he (C) will pay the judgment. The public records show C has property liable to execution, but A does not examine them. A accepts C's proposition; takes judgment for the small amount proposed by C, and C pays the judgment as agreed. Would any one suppose for a moment that the judgment could be set aside in equity by merely showing that C's statement to A as to his financial condition was false, and that A did not know it at the time because he failed to examine the public records?

Courts of equity will not grant relief on the ground that an attorney, through design or ignorance mismanaged the case or that the client being absent, the attorney, through a misapprehension of the facts, consented to a judgment.

2 Freeman on Judgments, Section 508.
Burton vs. *Wiley*, 26 Vt., 430.
White vs. *Bank of U. S.*, 6 Ohio, 528.
Thompson vs. *May*, 13 Ark., 600.
Burton vs. *Hynson*, 14 Ark., 32.
Broda vs. *Greenwald*, 66 Ala., 538.
Ezzell vs. *Watson*, 83 Ala. on p. 123.

Much stress is laid in this case upon the fact that, although the record declares that there was a jury and verdict ascertaining the amount, yet in truth and in fact there was no jury and verdict, and that the District Attorney consented to the rendition of the judgment. The trouble with the appellants is, that before they can ever introduce evidence to establish that fact, as was said by

Ch. J. Shaw in the case of *Green* vs. *Green*, there must first be made out a case where proof of the fact is admissible, and unless the alleged fraud is one which justifies a court of equity in admitting such proof, the judgment must stand as a judgment rendered by the Court upon the verdict of a jury ascertaining the amount in an adversary suit.

This Court must judicially know that nothing is more common in practice than for judgments to be entered up as upon a jury and verdict when in fact there never was a jury. It is the usual case where parties defendant appear and there is no actual trial, because in such a case there can be no judgment without the verdict of a jury, unless it is a judgment by consent, or a judgment entered on the withdrawal of the pleas. Wherever pleas are interposed in a case, if a judgment is entered up it would be erroneous on its face unless it showed that there was a withdrawal of the pleas and a judgment *nil dicet* thereupon, or that there was a consent judgment, or that there was a jury and verdict, or something equivalent to a jury and verdict, for instance, an ascertainment of the amount by the Court, a jury being waived.

But, as we have seen above, the United States is like all other parties to suits. They are bound by the same rules that any other parties would be bound by. The District Attorney was undoubtedly authorized to represent them, and the law is well settled that the action of an attorney authorized to represent a party is binding on that party at law and in equity, unless it was induced by the fraud of the adverse party, and that fraud must have been one which prevented him from asserting his claim or defence. And the rule that a party cannot in equity find relief from the consequences of his own neg-

ligence is equally applicable whether the neglect is that of himself or that of his attorney employed in the management of his case.

2 Freeman on Judgments, Section 500.
Vaughn vs. *Hewitt*, 17 S. C., 442.
Bradish vs. *Gee*, 1 Amb. 229.
Jones vs. *Williamson*, 5 Cold. 371.

The District Attorney not only had Power to Assent to the Judgment, but in the Case at Bar, his Action was Ratified by his Principal, the Appellant.

A number of authorities are cited by counsel for the appellants, in which judgments rendered by consent of an attorney have been set aside, some by courts of equity, but in most instances on motions for a new trial in the Courts rendering them. In every one of those cases there was a fraud by the opposite party which would have justified the setting aside, of a judgment independent of the fact that the attorney had no authority to compromise the claim. There is another fact which appellants seem to have overlooked; or, at any rate, to which they did not call the attention of the Court. In none of these cases did the party himself consent to or ratify the action of the attorney. There was an usurpation of power by the attorney and fraud by the opposite party. Those two combined operated to make a case for the interposition of a Court of Equity. It took them both to entitle the complainant to relief, because if the complainant had consented to the judgments in the cases he could not have asserted or set up the usurpation of power by the attorney.

In the case at bar it is not pretended but that the Dis-

trict Attorney and other United States officials knew the amount due on the bond of Widmer; that was a thing peculiarly within the knowledge of the officers of the government. In the very nature of things, it could not be known to the sureties on the collector's bond. Therefore, the government was never deceived by any act of the defendants with respect to the amount that was due on the debt. Nor did any act of defendants affect in any way its right to recover judgment for the full amount due. The only fact about which it is claimed the government was deceived was as to the property owned by the defendants and the ability to make a judgment out of them when recovered. In 1886, about fifteen months after the rendition of the judgment, the government of the United States accepted satisfaction of the same. We must presume, because it is not denied in the bill, that the officer of the treasury department who accepted this $100 with interest thereon from Beebe, in satisfaction of the judgment against him, was authorized to accept it. We do not suppose that, in a single one of the cases cited by the appellants on the power of a chancery Court to set aside a judgment rendered by consent of counsel without authority, the Court would ever have granted the relief, if, after the judgment was rendered, the client had ratified the action of counsel by accepting satisfaction of the same. We repeat what is said above, a statement made by a party, though untrue, cannot be a fraud which would justify a court of equity in setting aside a judgment unless there was some natural relation of cause and effect between the statement and judgment. It cannot be possible that a statement by a debtor as to his pecuniary condition would be a ground for setting aside a compromise made with him, especially where the matter about which the

statement was made is a fact to be ascertained from the public records. As to Beebe, the bill avers the statement was true; as to Henshaw, it avers the administrator made a report in a cause to which plaintiffs were parties disclosing all of his property several years before the judgment was rendered.

The Case of Holker vs. Parker, Relied Upon by Appellant, has no Application in the Case at Bar.

The appellant relies very greatly in this case upon the case of *Holker vs. Parker*, 7 Cranch, 436. The principles governing the decision in that case have no application here. In that case a judgment had been recovered in favor of Holker in the state of Pennsylvania. This Judgment was certified to a Court in Massachusetts, an attachment *sur* judgment issued, and his attorney employed for the collection of the judgment, without authority to do so, consented to the rendition of an award by arbitration to him of greatly less than was due. This was pure and simple a compromise of his client's rights not in a pending suit, and with no authority in the premises, except to collect the claim. There was not "an offer to buy or sell peace against a doubtful or disputed claim, the subject of a *pending* suit," but it was in effect an agreement to satisfy a judgment already rendered for a less sum than its full amount. There was no dispute that a judgment had been rendered and no controversy as to its amount. There was an agreement to take less for the judgment than the amount thereof.

In the case at bar the action of the District Attorney was in a pending suit, and the consent to judgment for

a smaller amount than was thought to be due was clearly within the powers of the District Attorney. "The power of an attorney is not co-equal, co-extensive, or the equivalent of the client. He is, as has been said in numerous decisions of this Court, a special agent, limited in duty and authority to the vigilant prosecution or defence of the rights of the client. He can enter into no bargains, or contracts, though he *may make* agreements in writing touching the course of proceeding in *pending* suits, or the issue or return of executions on judgments he may have obtained, which will bind the client, unless he has specially authorized or subsequently ratified them. . . Within the limits of that professional action which may be necessary for the conduct of the proceedings in the course of *pending* suits . . the attorney may have large discretionary powers given to him, that he may perfect and promote the rights and interests of the clients."

Robinson vs. *Murphy*, 69 Ala. on p. 547.

The authority of an attorney to compromise pending litigation is fully recognized in the English courts upon the theory that he is, as to the matters involved in the litigation, the general agent of his client. Many American Courts coincide with the English rule.

Prof. Green's note to Sec. 24, 8th Ed. Story on Agency.

Wharton on Agency, Sec. 587-92.

In *Holliday* vs. *Stuart*, 151 U. S. on p. 237, it was held that an agreement made by an attorney that certain property might be sold and the proceeds paid into the court to await the result of an appeal was binding on the client, and in *Bonnifield* vs. *Thorp*, 71 Fed. Rep., 924, it

is held that a party to a proceeding in court and represented by an attorney has no right to make agreements affecting the conduct of the case.

As in the case of the *United States* vs. *Child*, 79 U. S., 246, the claim was disputed by defendants. They said to the United States through its District Attorney, "We will pay you a certain sum on this disputed claim, provided you will take it in satisfaction of the whole," and when the United States accepted this proposition and received the money paid in carrying it out, that was the end of the matter.

Courts are reluctant to set aside a compromise, and in such cases very slight evidence of acquiescence on the part of the client will be deemed a ratification of the attorney's act in making the compromise.

3 Ency. of Law, 2nd ed., p. 360.

In this case, about a year after the judgment was rendered, the United States received the money, and still has it and does not offer to return it or credit it upon the amount it claims to be due.

As to the Rules and Regulations by Which the District Attorney is Alleged to Have Been Bound.

It is contended by the appellant (pp. 25-27 his brief) that certain regulations of the Solicitor of the Treasury, made in 1877, should have prevented the District Attorney from acting in the manner alleged, and that, therefore, the appellant has the right to set aside the judgments rendered. There are several reasons why these regulations can be of no avail in this case.

In the first place, there is no allegation concerning

them in the pleadings, and even if the Court would take judicial notice of their existence if set out and pleaded, in the absence of any mention of them in the pleadings, they cannot be invoked to aid the equity of the bill.

Again, even if it be admitted that these regulations are considered as a part of the bill, the bill does not allege that said judgments were not taken with the full concurrence and assent of the Solicitor of the Treasury, and, taking the bill most strongly against the pleader, as we are bound by all rules to do, we must presume, in the absence of allegations to the contrary, that the District Attorney acted within the scope of his authority and with the approval of the Solicitor of the Treasury, especially when we consider the other part of the bill, in which it is set forth that the amount due on the judgment against Beebe was accepted by the appellant, presumably after the District Attorney had made report of his actions in due form and at the proper time.

It is not alleged in the bill that this action of the District Attorney was not taken under circumstances which allowed him, according to the terms of the regulations set out on page 27 of appellant's brief, to act without consultation with the Solicitor of the Treasury. The mere allegation that the District Attorney acted without authority and in violation of the law, is but a conclusion of the pleader which will be disregarded as being general and not specific in its nature. It is not controverted that the District Attorney made immediate report of his action, and the acceptance of the amount of the Beebe judgment would tend to show acquiescence in his action by his superiors.

And finally, it is not alleged that Beebe or Henshaw had any notice of the regulations made by the Solicitor of

the Treasury referred to, and they were not bound to know such regulations on the principle that every man is bound to know the law, because these regulations were simply the instructions from a superior to his inferior and not binding on a party who dealt with said inferior within the scope of his apparent authority.

The Amendment did not Cure the Defects of the Original Bill, but did Add a new Cause of Action and made the Bill Multifarious.

The bill as originally framed was a bill to set aside a certain judgment and have an accounting as to what was due by Beebe and Henshaw on the Widmer bond. The bill as amended is not only a bill to set aside that judgment and have an accounting, but it is a bill to enforce the collection of a judgment against Beebe alone on the Dustan bond. The amendment introduces a new cause of action and by it appellant seeks to recover not only against Beebe but gainst the Henshaws upon a claim upon which neither Henshaw nor his estate were ever liable, and as to which Beebe alone was liable. The bill as amended, therefore, would require two measures of relief, the one against Beebe and Henshaw jointly, and the other against Beebe alone. Two such claims cannot be enforced in the same bill. The two being joined makes the bill multifarious.

Story's Eq. Plead., Sec. 271.
Kimberly vs. *Arms*, 40 Fed. Rep., 548.

The appellant fails utterly to meet this objection as to multifariousness, and we cannot adopt the rule invoked

by counsel for it (p. 34 his brief) for the Court had jurisdiction both of the claim against Beebe and Henshaw jointly and of the claim against Beebe alone, if these separate and distinct matters had been presented in separate bills. How is the fact that Beebe alone was liable on the bond of Dustan to help to elucidate the question whether or not the judgments against Beebe and Henshaw as sureties on the bond of Widmer had been brought about by fraud or through lack of authority on the part of the District Attorney? Of what interest can it possibly be to the representative of Henshaw whether Beebe shall or shall not be held liable as the bondsman of Dustan, and why should the representative of Henshaw be required to litigate that question with appellant? If we adopt the suggestion of appellant and consider as stricken out of the bill one of these inconsistent claims, which shall it be? Shall it be the claim against Beebe and Henshaw jointly, or the claim against Beebe alone? Who is to decide this matter? The Court had jurisdiction of both claims, and it seems to us the appellant should have elected as to which claim he would prosecute, and should have eliminated the other from his bill. This he has failed to do. He has chosen to prosecute both of these inconsistent claims together, and he must stand on his bill as he has made it. Clearly, the appellant has no right to prosecute in the same bill two separate and distinct claims, as to one of which some of the parties defendant have no interest, and as to which said parties could under no circumstances be made liable.

Hardin vs. *Swope*, 47 Ala., 273.
Kinsey vs. *Howard*, 47 Ala., 236.
Johnson vs. *Parkinson*, 62 Ala., 456.
Andrews vs. *Jones*, 68 Ala., 117.

It is respectfully urged, therefore, that there is no error in the record, and that the decision of the Court of Appeals should be affirmed.

ALEXANDER TROY,
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Attorney for all the Appellees, except the Henshaw heirs.

Office Supreme Court U.S.
FILED
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JAMES H. MCKENNEY

No. 71.

Reply Br. of Troy & Cattell for

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed November 7, 1900.

No. 71.

UNITED STATES OF AMERICA, APPELLANTS,

vs.

EUGENE BEEBE ET AL., APPELLEES.

REPLY TO APPELLANTS' BRIEF.

AUTHORITY OF DISTRICT ATTORNEY TO ASSENT.

Apart from the discretionary powers especially conferred upon the district attorney, as recited upon page 27 of appellants' brief, to accept a judgment under certain circumstances for a less amount than that claimed by the United States, every attorney, by virtue of his office and his relation to his client, has inherent power to accept judgment or confess judgment in a pending litigated case, and by so doing to bind his client.

Wharton on Agency, 8th edition, section 585.

Denton *versus* Noyes, 6th Johnson (N. Y.), page 296.

Talbot *versus* McGee, 4th T. B. Monroe (Ky.), page 377.

In Denton *versus* Noyes, the attorney entered an appearance for a defendant who had not been served and confessed judgment. The court sustained the judgment, preserved the lien of it against real estate which had been attached, and let the defendant into a defense upon the merits. In so doing the court said:

"By licensing attorneys, the court recommend them to public confidence, and if the opposite party who has concern with the attorney, in the business of the suit, must always at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience."

AS TO LACHES.

It is argued by appellants that the Government is not to be bound either by laches of the district attorney in consenting to the judgment, nor of the officer of the Treasury in accepting the amount of the judgment, nor by the failure of the officers of the Government to move for a new trial or to annul the judgment until more than five years after the judgment had been rendered, nor by the failure of its officers to offer to refund or credit the amount of the judgment so received before filing its bill, and cites a number of cases in support of this proposition.

It is respectfully submitted that they do not appear to be in point.

Gibbons *versus* United States, 8th Wallace, 269, relates to a suit for damages against the Government arising from the action of a quartermaster of the United States Army in committing a breach of contract, and decides that the United States is not to be held liable for the "unauthorized acts of its officers, those acts being in themselves torts."

Hart *versus* United States, 95 United States, page 316, decides "that the Government may be the loser by the negligence of its officers, but never becomes bound to others for the consequence of such neglect, save by express agreement to that effect."

In Whiteside *vs.* United States, 93 United States, 247, special agents of the Treasury were authorized to collect abandoned or captured property and to make contracts with others to this end and to pay not exceeding 25 per cent. of proceeds in full compensation. It was held that the agent had no power to bind the Government to pay *50 per cent.*, nor to pay a sum of $17,356 for expenses, when no condemnation or sale resulted from the seizure.

Moffat *versus* United States, 112 United States, 24, is especially distinguished from United States *versus* Throckmorton and Vance *versus* Burbank.

The most casual examination of these authorities will show that they are based upon public policy—the theory that it would be against the public interest to subject the United States to suits for damages in cases where its officers or employés by the commission of unauthorized acts, breaches of contract, or torts, inflict injury or loss upon others.

They do not decide, however, that the United States shall take advantage of the laches of its officers to relieve itself of losses resulting from their actions, not induced by the fraud, misrepresentation, or mistakes of other parties to the transaction, or to impose such loss upon others; nor can they for one moment be regarded as authority for the proposition that the Government will be relieved of responsibility for the mistake or unwise exercise of discretionary power committed

or exercised by its counsel in open court in the trial of an adversary and litigated cause. The counsel in such case is not merely the agent of the Government; he is also an officer of the court in which he pleads the cause of his client. He is under oath to discharge his duty with fidelity as well to the court as to his client. If he knows of any reason why by virtue of his limited power or otherwise he should not consent to a judgment being taken, or to any other action in the cause which may be required of him, it is his duty to disclose it.

In the case at bar there is no charge that the district attorney was corrupted or misbehaved in his office. Every presumption, therefore, should be in his favor. He must be presumed to have acted with the utmost fidelity to his client and to the court. Having done this, the client is bound by his action.

Respectfully submitted.

ALEXANDER TROY and
HENRY S. CATTELL,
Attorneys for Appellees.

Supreme Court of the United States.

No. 71.—October Term, 1900.

The United States, Appellant, vs. Eugene Beebe, William A. Henshaw, et al. } Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

[February 25, 1901.]

On the tenth day of March, 1890, the United States brought suit in the Circuit Court of the United States for the Middle District of Alabama, against Eugene Beebe and the heirs at law of one Ferris Henshaw, deceased, praying that two separate judgments in favor of the United States (one against Beebe and the other against the administrator of Henshaw) should be set aside and vacated; for the removal of the administration of the estate of Henshaw into that court; for an accounting by Beebe and the other defendants by reason of the liability of Beebe and Henshaw on the bond of Francis Widmer, late collector of internal revenue in the second district of Alabama, and that the amount found due on the accounting should be made a prior lien on the land described in the bill, and for other relief.

The defendants demurred to the bill and the court sustained the same, after which the bill was amended and again demurred to. The defendant Beebe died August 24, 1894, and the complainant revived the suit against his heirs at law, and subsequently the court sustained the demurrers to the amended bill, and the judgment dismissing the bill was upon appeal affirmed by the Circuit Court of Appeals for the Fifth Circuit, and from that judgment of affirmance the United States has appealed to this court.

The following facts were set forth in the bill: Some time in 1873 one Francis Widmer was appointed collector of internal revenue for the second district of Alabama, and Eugene Beebe and Ferris Henshaw became sureties on his bond in the sum of fifty thousand dollars. Widmer defaulted and failed to account for and pay over to the government the sum of $28,158.56 public moneys that had come into his hands as collector, which sum was due the United States, with interest thereon from January 1, 1874. Beebe and Henshaw had for many years been partners in business, and were joint owners in fee of certain real estate described in the bill and situated in the county of Montgomery and State of Alabama. Henshaw died there, intestate, April 19, 1879, leaving certain of the defendants named in the suit as his heirs at law. The administrator of the estate of Henshaw reported to the court that his estate was insolvent,

and in accordance with that report the estate was on July 2, 1880, declared to be insolvent, and no settlement of the estate has since been had. Beebe before and since July 2, 1880, was and has been insolvent, without sufficient property to pay his debts. Ferris Henshaw was also insolvent at the time of his death. By reason of the insolvency of Eugene Beebe and Ferris Henshaw and the insolvency of the latter's estate the United States became and was entitled to priority of payment over any and all other creditors of Beebe and Henshaw out of their property and estate, of the full amount collected, withheld and appropriated by Widmer, the collector, and due to the United States. It is averred that the land above described is liable for such debt, and also that the complainant has a prior lien upon it therefor.

On June 3, 1880, separate actions in the Circuit Court of the United States for the Middle District of Alabama were commenced, one against Beebe and the other against the administrator of the estate of Henshaw, for the recovery of the sums for which Widmer, collector, was in default, and amounting, as stated, to over $28,000, with interest, and those suits were continued from time to time, at the request of the defendants, until February 6, 1885, when judgments were severally entered in that court against Beebe, and also against Hatchett, as administrator of Henshaw, for $100 and costs, and Beebe on July 1, 1886, paid into the Treasury of the United States the sum of $109.85 as the amount of the judgment and costs rendered against him, but the judgment against Hatchett, as administrator, remained unsatisfied to the date of the filing of the bill in this suit.

The bill then proceeds as follows:

"That said judgments were entered under the following circumstances: That said defendants came into court, and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferris Henshaw were poor men, and that said Beebe and the estate of Ferris Henshaw were without property out of which the said judgments could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their estates, by execution, but that if the court would allow a jury and verdict to be entered against them for one hundred dollars they, and each of them, would pay said judgments and costs; that no evidence or proof was or had been introduced in said causes, or either of them; the indebtedness of said Beebe and Henshaw to the United States then being twenty-eight thousand one hundred and fifty-eight dollars and fifty-six cents ($28,158.56), and interest, or other large sum; and the statements and representations aforesaid only were before the said Circuit Court at the time of the entry of said judgments; and no hearing or determination upon the law or the facts involved in said cases was ever had in said court; whereupon the court remarked that unless the district attorney of the United States objected, the causes might be disposed of as suggested aforesaid; said district attorney did not object, and said judgments for one hundred dollars and costs were entered in each of said causes. And orator avers and charges that said statements and representations made as afore-

said by and on behalf of, and for, said Beebe and said Ferris Henshaw, and the estate of said Ferris Henshaw, were wholly untrue, and were made to deceive said court and United States attorney, and for the purpose and with the intent to defraud the United States. Orator further avers and charges that said court and United States attorney had no authority in law to accept said statements and representations, which were not made under oath nor in the course of any judicial proceeding, and were not supported nor verified by evidence or proofs; and that said acts of said court and United States attorney amounted in law and in fact to, and was, and was intended to be, a mere naked compromise of the claim and demand of the United States against said Eugene Beebe and Ferris Henshaw, and the estate of said Ferris Henshaw, which said court and the United States attorney had no authority, but were inhibited by law, to make, entertain and consummate; that said court was without jurisdiction and power to determine said causes in the manner aforesaid; and that said alleged judgments for one hundred dollars and costs are null and void *ab initio*, and of no effect, and should be vacated and held for naught in this court of equity."

The bill then asks for the appointment of an administrator *ad litem* of the Henshaw estate to represent it in the proceeding. It alleges that several of the defendants, naming them, assert some claim against the property described in the bill, which claims are alleged to be subordinate to the rights of the United States to condemn and subject the land already mentioned to the satisfaction of the indebtedness of Beebe and Henshaw as sureties on the bond of Widmer, as collector, by reason of the default of the latter; and it is alleged that if any conveyance of the land has been made by Beebe or Henshaw, or the heirs of the latter, that such conveyances were void and ought to be vacated and set aside. It is further stated that the facts and circumstances set out in the bill as the basis of the relief asked for only recently came to the knowledge of the complainant, to wit, on or about March 5, 1890. The bill also set forth that on March 22, 1877, Beebe conveyed by deed to Ferris Henshaw, then his partner in business, all his interest and estate in the property described in the bill for certain purposes therein set forth, and this deed complainant alleges was without consideration and fraudulently made to hinder, delay and defraud the existing creditors of Beebe and was void, and all the property described in the bill was bound even in the hands of the heirs at law of Henshaw for the payment of the debts due the United States from Beebe. The complainant prayed that the judgments might be set aside and vacated, and the property sold and the proceeds thereof applied to the payment of the debts above mentioned.

The defendants severally demurred to the bill on various grounds, (1) for want of equity; (2) that the bill showed that the matters complained of against Beebe and Henshaw, by reason of their being sureties for Widmer, the collector, had been adjudicated in the Circuit Court of the United States for the Middle District of Alabama, in a suit commenced by the

complainant against them, and that no sufficient ground was shown for vacating and setting aside the judgments therein rendered; (3) that it appeared from the allegations in the bill that the judgment against Beebe had been paid by him, and had been received and accepted by the complainant, the United States, and the bill contained no offer to refund the money, and it does not show that the same had ever been tendered to Beebe. Other grounds were stated in the demurrers.

Upon the hearing the court sustained the demurrers and granted leave to amend the bill. On January 5, 1891, the complainant amended its bill, the amendment alleging that Beebe had executed another official bond as surety for one Dustan, deputy postmaster at Demopolis, Alabama; that a default had occurred and judgment been recovered against Beebe for $579.45 in 1878, and the judgment was still due and unpaid, and execution thereon having been issued was duly returned "no property."

The amended bill also contains an averment that there was in fact no jury drawn in the cases in which the two judgments were obtained and no verdicts rendered therein, although the records of these judgments show a jury trial and a verdict in each case.

To this bill as amended the defendants demurred, setting up the same grounds of demurrer as to the original bill, and also the additional grounds, (1) that the bill made a new case; (2) that the matters stated in the amendment were not germane to the purposes and object of the original bill, and stated new matter; (3) that the bill as amended was multifarious.

The demurrers to the amended bill were sustained, and the bill was finally dismissed.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The principal claim against the defendants is based upon the manner in which the two separate judgments were obtained against the defendant Beebe, and the administrator of Henshaw, in the Circuit Court of Alabama on February 6, 1885. The amount due on one of those judgments (that against Beebe) was paid into the United States Treasury on July 1, 1886, and this suit was commenced in March, 1890.

The grounds upon which the court is asked to set aside the judgments so entered are (1) fraud in procuring them, and (2) the absence of power on the part of the district attorney to make the compromise, and the consequent invalidity of the judgments entered thereon.

The only ground upon which the allegation of fraud in relation to the judgments is based consists in the averment in the bill that the defendants came into court and represented that they were poor men; that Beebe and the estate of Henshaw were without property out of which any judgment could be collected or paid; that no part of any judgment could be col-

lected by due process of law; that nothing could be made out of them or either of them or their estates by execution, but that if the court would allow a jury and a verdict to be entered against them for $100 they and each of them would pay said judgments and costs. Accordingly judgments were so taken without any evidence given or hearing had upon the merits of the claim.

It is manifest that these allegations would furnish no defense to the cause of action on the part of the United States against the defendants as sureties on the bond of Widmer. The statements had no tendency to prevent full preparation for trial on the part of complainant, nor did they tend in any way to obstruct the full presentation of the cause of action against the defendants on the trial. It is plain, therefore, that the representations, assuming them to have been false, could not constitute such a fraud as upon well settled principles a court of equity will relieve against by setting aside a judgment in a case where such representations were made. (*United States* v. *Throckmorton*, 98 U. S. 61; *Ward* v. *Town of Southfield*, 102 N. Y. 287, 292.) The first case has also been cited with approval in *Moffat* v. *United States*, (112 U. S. 24, 32,) although a distinction is therein made taking it out from the rule recognized in Throckmorton's case.

But in fact there was no deception in the case. The bill itself avers that the estate of Henshaw had been declared insolvent upon a report of the administrator in 1880, and there is no allegation that the estate was not insolvent at that time. There is on the contrary a distinct allegation that the defendant Beebe, at, before and since July 2, 1880, had been insolvent and without sufficient property to pay his debts, including his indebtedness to the United States, and also that Ferris Henshaw at the time of his death was insolvent and without sufficient property to pay his debts, and that by reason of the insolvency of Beebe and Henshaw and the estate of Henshaw the government was entitled to priority of payment. (Section 3466, Revised Statutes of the United States.)

The insolvency of Beebe and the estate of Henshaw was thus made a material averment of the bill in order to base the demand upon the part of the United States for priority of payment of its debt of more than $28,000, which would exist, as was alleged, upon the setting aside of these judgments. It is obviously impossible to found an allegation of fraud upon a representation made by and for the defendants in open court, which simply states as a fact that which the bill of the complainant itself distinctly avers was a fact. It is true the defendants, as the bill alleges, based their application for reduced judgments upon this fact of insolvency, but whether the application were or were not meritorious is quite immaterial upon the issue of fraud, so long as the statements upon which it was made were neither fraudulent nor even false.

It is entirely plain there was no fraud in the case, and therefore this ground for complainant's relief cannot be sustained.

But a very different question arises from the alleged absence of power on the part of the district attorney to make the compromise and the consequent invalidity of the judgment entered thereon.

By demurring to the amended bill it is admitted that in former suits commenced by complainant against the defendants Beebe and the administrator of the estate of Henshaw, upon a claim to recover some twenty-eight thousand dollars with interest for a number of years, based upon the liability of the defendants upon a bond to the United States executed by them as sureties, two separate judgments were entered in favor of the United States at a term of the United States Circuit Court for the Middle District of Alabama, each judgment being for the sum of only $100 and costs, and that although the judgment records showed a regular trial before a jury and a verdict in each case, yet in truth there had been no jury, no witnesses, no evidence and no verdict, and that the judgments were simply the result of a compromise of the claim in each of the two suits as agreed upon by the district attorney on the one side and the defendants upon the other. Upon these facts the appellant claims that the judgments were wholly void for want of jurisdiction in the court to authorize them.

The appellants also claim that if not void, the judgments were at least irregular, and upon the facts averred in the bill ought to be set aside.

We do not think that they were void as if rendered by a court having no jurisdiction of the person or of the subject matter, as confessedly the court had jurisdiction over both; but the facts just stated and which are admitted by the demurrers are enough in our opinion to call for the setting aside of those judgments. It is enough, without alleging fraud in their entry, that they simply carry out and represent a compromise made by the district attorney which he had no power to enter into, and which rendered the judgments so far unauthorized as to permit a suit to set them aside.

We think there can be no serious question that a district attorney of the United States has no power to agree upon a compromise of a claim in suit except under circumstances not present in this case. There is no statute of the United States and no regulation has been called to our attention giving a district attorney any such power, but, on the contrary, it is provided in paragraph 7 of the regulations established by the Solicitor of the Treasury, and approved by the Attorney General, pursuant to section 377 of the Revised Statutes of the United States, that no district attorney shall agree to take a judgment or decree for a less amount than is claimed by the United States, without express instructions from the Solicitor of the Treasury, unless circumstances exist which do not obtain in this case. The power to compromise a suit in which the United States is a party does not exist with the district attorney any more than a power to compromise a private suit between individuals rests with the attorney of either party,

and that such an attorney has no power to compromise a claim in suit has been frequently decided. (*Holker* v. *Parker*, 7 Cranch, 436.) In that case it was remarked by Marshall, Chief Justice, that—

"Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party."

The same has been held in Massachusetts in *Lewis* v. *Gamage*, (1 Pick. 347;) and in New York in *Barrett* v. *Third Avenue Railroad Company*, (45 N. Y. 628, 635,) and *Mandeville* v. *Reynolds*, (68 N. Y. 528, 540.) And see *Kilmer* v. *Gallaher*, (Supreme Court of Iowa, December 22, 1900, 52 Cent. L. J. 150, and note); *Bigler* v. *Toy*, (68 Iowa, 688.) Indeed, the utter want of power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed.

A judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests. *Prima facie*, the act of the attorney in making such compromise and entering or permitting to be entered such judgment is valid, because it is assumed the attorney acted with special authority, but when it is proved he had none, the judgment will be vacated on that ground. Such judgment will be set aside upon application in the cause itself if made in due time or by a resort to a court of equity where relief may be properly granted.

In *Robb* v. *Vos*, (155 U. S. 13,) it was held that although the judgment was on its face valid and regular, yet inasmuch as the attorney who appeared on behalf of one of the defendants did so without the consent of his principal, the remedy of the principal, when the facts came to his knowledge, was in equity, where the judgment might be set aside as to him. So, if the judgment be in fact entered upon a compromise made by the attorney who had no authority to make it, the judgment may be attacked and set aside in an equitable action upon proof of the necessary facts. Although the judgment is not void for want of jurisdiction in the court, it will yet be set aside upon affirmative proof that the attorney had no right to consent to its entry.

It is said that the judgment being valid on its face, evidence to contradict its recitals is not admissible unless in case of such a fraud as will be relieved against in a court of equity. Fraud under certain circumstances is a ground upon which a judgment may and will be set aside; but in addition

to such ground, where, as in this case, the judgment is entered upon a compromise made by an attorney, entirely unauthorized, and without any trial, we have no doubt that such fact may be proved in order to lay the foundation for an application to a court of equity to set the judgment aside, although the proof contradicts the record of the judgment itself and shows that in fact there was no jury, no trial and no verdict.

It is however urged that the government has lost its right to assail these judgments because of the lapse of time and because one of the judgments was paid before the commencement of this suit. The bill shows that they were entered on February 6, 1885, and that on July 1, 1886, Beebe paid the amount of the judgment against him into the Treasury of the United States. The bill was not filed until March 10, 1890, and it is therefore said that the government has ratified the action of the district attorney by a failure to proceed to set the judgments aside at an earlier date than it did.

It is not averred in the bill to whom Beebe paid the amount of the judgment, but there is simply a statement that it was paid into the Treasury of the United States. We must probably assume from such averment that the payment was made to an officer who had the right to receive the money, but it is not charged that such officer received it with knowledge of the facts preceding the entry of the judgment and by virtue of which such judgment was entered. There would be nothing in the record of the judgment itself which would show anything other than a regular trial of the case and a verdict of a jury upon which the judgment was entered; consequently there would be nothing in the record which would charge the officer with knowledge that the judgment was only the result of and represented a compromise made by the district attorney, which he had no power to make.

In addition to this want of notice there is an averment in the bill that the facts and circumstances set out therein as the basis of the relief asked for by the bill had only come to the knowledge of the complainant on or about March 5, 1890. From 1885, when the judgments were entered, no one having authority to act in the premises for the government had any knowledge of these facts until March, 1890, and this the demurrers admit. Generally speaking, the laches of officers of the government cannot be set up as a defense to a claim made by the government. (*United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *United States* v. *Vanzant*, 11 Id. 184; *Dox* v. *The Postmaster General*, 1 Pet. 318, 325; *Hart* v. *United States*, 95 U. S. 316; *Gaussen* v. *United States*, 97 Id. 584.)

But we fail to see wherein the officers of the government have been guilty of laches. There has been no ratification of any unauthorized act of the district attorney by reason of any delay on the part of the government after knowledge of the facts, and without that knowledge there can be no ratification and in this case no laches.

Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event. (Story on Agency, 9th ed. sec. 239, notes 1 and 2). If there be want of it, though such want arises from the neglect of the principal, no ratification can be based upon any act of his. Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them. Here, it is denied by an express averment in the bill to that effect, and must be taken as a fact. There being no knowledge of the facts on the part of the government until March, 1890, we think there were no laches on its part which would bar the maintenance of this suit. We think it cannot be said that a failure to earlier obtain knowledge was evidence of neglect upon the part of the officers of the government, even though neglect would affect the government in its right to maintain this suit.

Nor do we think the omission to make in the bill an offer to repay the hundred dollars and costs paid into the Treasury of the United States constituted a fatal defect in the pleading. It was a payment of money only, and the amount might be properly credited to the representatives of Beebe upon the trial of the action, and constitute by that amount a reduction of the claim of the government; or if, upon the trial, the compromise being set aside and the cause tried on its merits, it should appear there was nothing due to the government on its claim, the amount paid by Beebe into the Treasury together with interest thereon might be the subject of judgment against the government. At any rate, no payment has been made upon the judgment against Henshaw's estate, and the payment made by Beebe did not operate as a payment of the judgment against that estate, because by the terms of the agreement as set forth in the bill the compromise consisted in a promise to pay by each the amount of each judgment of a hundred dollars and costs. The amended bill is not therefore defective so as to be demurrable as not containing facts sufficient to constitute a cause of action. And we do not think it is multifarious. The amendment but added another claim to those already made which were averred to be prior liens upon the lands in the hands of the Henshaw heirs at law. If the lands described in the bill, or any portion of them, have been conveyed to *bona fide* grantees for value, nothing in this opinion can be taken as in any way passing upon the question of their right to insist that they took the lands free and clear of any lien in favor of the government, other than the $100 judgments.

To conclude, we are of opinion that the district attorney had no authority to compromise the claim of the government by consenting to the entry of

the judgments in question and as that unauthorized act on his part has never been ratified by the government, with knowledge of the facts, and no laches are in reality attributable in this case to the government, which proceeded at the earliest moment after the discovery of the facts to file this bill, we are of opinion that a cause of action was set forth in the amended bill and that the demurrers to such amended bill should be overruled.

The judgments of the United States Circuit Court of Appeals for the Fifth Circuit and of the Circuit Court of the United States for the Middle District of Alabama are therefore reversed and the case remitted to the latter court with directions to overrule the demurrers, with leave to the defendants to answer, and for such further proceedings as are consistent with this opinion.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.